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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-419

AUTOMOTIVE CHAUFFEURS, PARTS AND GARAGE EMPLOYEES, LOCAL UNION 926, et al.,
Petitioners,

v.

NAPA PITTSBURGH, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the Third Circuit

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To the United States Court of Appeals
For the Third Circuit

Petitioners Automotive Chauffeurs, Parts & Garage Employees, Local Union No. 926, Michael Gardner, Gerald Lee, Raymond Salerno, and William Dorsey respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on August 8, 1974.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit and the dissenting opinions, not yet officially reported, appear unofficially at 87 LRRM 2044. They are ap-

pended at App. A, pp. A-1-A-29, *infra*. The opinion of the United States District Court for the Western District of Pennsylvania appears at 363 F. Supp. 54. It is appended at App. B, pp. A-30-A-38, *infra*.

JURISDICTION

The judgment on rehearing in banc of the United States Court of Appeals for the Third Circuit was entered on August 8, 1974. It is appended at App. C, p. A-39, *infra*. This Court has jurisdiction under 28 USC § 1254 (1).

QUESTION PRESENTED

Does a court of the United States have jurisdiction, notwithstanding § 4 of the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. § 104, to restrain a labor organization and its members from conduct protected therein where:

(a) the protected activity is in furtherance of a labor dispute which is not arbitrable under the collective bargaining agreement and only the contractual right of employees to engage in protected activity is claimed to be arbitrable by the party seeking the injunction; and

(b) the language in the collective bargaining agreement expressly excepts from its no-strike provisions the right to engage in the type of protected activity sought to be enjoined?[1]

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[1] Petitions for certiorari in *Local 391, Int. Bro. of Teamsters v. Pilot Freight Carriers, Inc.*, No. 74-48, and *Local 1426, Int. Longshoremen's Assn. v. Wilmington Shipping Co.*, No. ——, present an essentially similar question and are already pending before this Court.

STATUTES INVOLVED

This case involves § 4 of the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. § 104, as well as § 301(a) of the Labor-Management Relations Act of 1947 (LMRA), 61 Stat. 156, 29 U.S.C. § 185(a). These provisions are appended at App. D, p. A-40, *infra.*

STATEMENT OF THE CASE

1. Federal Jurisdiction

This case arose when NAPA Pittsburgh, Inc. (NPI), invoked the jurisdiction of the district court under § 301(a), LMRA, to secure injunctive relief against a work stoppage under the "narrow" exception to the anti-injunction provisions of the Norris-LaGuardia Act carved out in *The Boys Markets, Inc. v. Retail Clerks Union Local 770*, 398 U.S. 235, 253 (1970).

2. The Parties

Respondent NPI, directly or through its Superior Motor Parts Division, operated five automotive parts warehousing and sales branches in Pittsburgh, Pennsylvania and vicinity, including premises on Hamilton Avenue in Pittsburgh (A-30). Petitioner Automobile Chauffeurs, Parts and Garage Employees Local Union 926 (Local 926) was party to a collective bargaining agreement with NPI covering employees at all five locations (A-32). No provision of this agreement obligated NPI or its corporate affiliates to recognize any union elsewhere in the enterprise. NPI's wholly-owned subsidiary, NAPA Altoona, Inc. (NAI), engaged in the same business at a facility near Altoona, Pennsylvania,[2] but had no collective bargaining agreement covering its warehousemen and truckdrivers (A-32).

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[2] This was the assertion of NPI's counsel to the district court. Appendix, p. 7a.

3. The Factual Background

NAI's refusal to recognize Teamsters, Chauffeurs & Helpers Local 110 (Local 110) as the exclusive bargaining agent of its warehousemen and truckdrivers at Altoona, while proceedings for a representation election before the National Labor Relations Board dragged on, provoked the workers to strike and picket in support of Local 110's demand for recognition (A-3, A-32). To promote these efforts, Local 110 extended its picketing to NPI's Hamilton Avenue premises (A-3). As a result, members of Local 926 refused to cross the picket line and work (A-32).

Although the four-step grievance arbitration procedure in the collective bargaining agreement between Local 926 and NPI was open to "any and all grievances, complaints or disputes arising between the Employer and the Union or any employee represented by the Union," the no-strike language applied only to work stoppages during the "pendency" of grievance proceedings (A-31). Article XIII of that agreement expressly provided:

> "It shall not be a violation of this Agreement . . . in the event an employee refuses to enter upon any property involved in a primary labor dispute or refuses to go through or work behind any primary picket lines . . . at the Employer's place or places of business." (A-31)

The work stoppage by members of Local 926 was caused only by the presence of Local 110's picket line, not because of any grievance, complaint or dispute between NPI and Local 926 or any employee it represents (A-11). Local 926 advised its members that its agreement permitted them to respect the picket line established by the sister local and to cease work (A-32).

4. The Proceedings Below

NPI sought to enjoin the work stoppage, asserting that it was caused by Local 926's "support of Local 110's demand

for recognition at Altoona" and that the work stoppage was in "direct violation" of Local 926's agreement to submit all disputes to binding arbitration.[3] The question to be arbitrated, NPI urged, was not the dispute that gave rise to the picketing and work stoppage at Pittsburgh but the legality of the work stoppage itself, *i.e.*, whether Local 110's picketing at that location was, as NPI claimed, secondary and therefore unprotected by Article XIII of the agreement (A-4).

The district court's decision and order directed Local 926 to "require" its members "to return to work immediately and cease their work stoppage in honoring the picket line of Local 110" (A-38) and ordered arbitration of what it termed the "underlying dispute in this case, that is the right of the Local Union to refuse to cross the picket line" (A-36). However, the court refused to decide whether the work stoppage violated the collective bargaining agreement, reasoning that the "merits" of that claim were for the arbitrator to decide (A-36). The Fifth Circuit's *Amstar*[4] decision was distinguishable, he ruled, because its rationale directed a different result where, as here, the agreement contained a "specific provision for picket lines" (A-36).

On appeal, following a hearing before a panel of the court, the case was submitted for rehearing in banc. In a six to three decision filed August 8, 1974 the Court of Appeals affirmed the judgment of the district court.[5]

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[3] Appendix, pp. 4a-5a.

[4] *Amstar Corp. v. Amalgamated Meat Cutters & Butcher Workmen*, 468 F. 2d 1372 (5th Cir. 1972).

[5] The Court of Appeals unanimously overruled NPI's motion to dismiss the appeal as moot because Local 110 had withdrawn its picket line at Hamilton Avenue. Local 926's right to indemnification on the injunction bond, if it prevailed on the merits, was, the court held, sufficient to present a viable controversy (A-2, n. 1).

The majority[6] read *Boys Markets* to hold "in essence" that injunctive relief is permitted whenever the court, applying the presumption of arbitrability, would direct arbitration of the legality of the work stoppage itself (A-5). Thus it, too, declined to decide whether the work stoppage violated Local 926's agreement, reasoning that it was for the arbitrator to determine whether the picket line was primary or secondary (A-6). *Amstar* and similar cases were distinguished on the ground that those contracts lacked provisions "restricting the union's right to honor picket lines of other labor organizations" (A-6).

Judge Hunter's dissent, joined by Chief Judge Seitz and approved by Judge Adams,[7] "comes down to" a disagreement as to the meaning of *Boys Markets* (A-9). On policy grounds Judge Hunter distinguished between the impact of work stoppages to force employer capitulation on an arbitrable grievance as in *Boys Markets* and those in which the underlying dispute is not subject to arbitration. The former thwart federal labor policies favoring arbitration in important ways that the latter do not. Moreover, to permit injunctive relief in the latter cases would work to inhibit the arbitration process since, having secured early judicial restraint without reaching the merits, an employer would have little to gain from the award and thus strong incentive to obstruct and delay the arbitration process. On the other hand, a union with possible damage liability in mind, would not be similarly tempted.

Judge Hunter concluded that *Boys Markets* permits a no-strike injunction "only when an arbitrable issue is itself the 'underlying cause' of the srike." First, because this Court limited its

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[6] Circuit Judge Weis, joined by Judges Van Dusen, Aldisert, Gibbons, Rosenn and Garth.

[7] In addition, because of the "historical backdrop", Judge Adams reasoned that doubtful cases near the perimeters of the narrow *Boys Markets* exception should be resolved in favor of the applicability of the Norris-LaGuardia Act (A-28).

holding to strike "over" arbitrable disputes. Second, because this Court termed the *Boys Markets* exception "narrow" and the decision below would allow injunctions indiscriminately whenever an employer could concoct an arbitrable claim that the work stoppage might violate some express or implied provision of the agreement. And third, because the interests that warranted relief in *Boys Markets* were not present in the instant matter. *Amstar*, he noted, furnishes "direct support" for this conclusion, and cannot "sensibly" be distinguished on the ground that the picket line clause that Local 926 negotiated actually "restricted" its right to engage in work stoppages (A-21, n. 14). Finally, Judge Hunter concluded from his analysis of this Court's recent decision in *Gateway Coal*,[8] that nothing therein suggested abandonment of the "underlying cause" requirement of *Boys Markets* (A-21-A-24).

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[8] *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368 (1974).

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts in Principle With This Court's Holding in *The Boys Markets v. Retail Clerks Union*, 398 US 235.

In *The Boys Markets v. Retail Clerks Union Local 770*, 398 US 235 (1970) this Court struck a principled accommodation of the policies of § 301 of the LMRA and those of § 4 of the Norris-LaGuardia Act so as not to "undermine the vitality" of the latter, 398 US at 253. Norris-LaGuardia, of course, was enacted primarily to protect "working men in the exercise of organized economic power."[9] The decision below, however, not only saps § 4 of vitality, it would deny workers their contractually secured rights to exercise economic self-help. Under its sweeping holding, a court must issue the no-strike injunction, resolving "any doubt" against worker exercise of organized economic power during the life of a labor agreement that treats with the subject and provides for arbitration of employer complaints (A-5). That result as well as the reasoning applied to reach it conflict irreconcilably with the controlling principles set forth by this Court in *Boys Markets*.

For *Boys Markets* permits injunctive relief only if the parties are contractually bound to arbitrate the underlying dispute, ***i.e.***, the grievance dispute concerning which the strike was called. This was the language chosen by Mr. Justice Brennan to describe the holding in *Sinclair Refining Co. v. Atkinson*, 370 US 195 (1962) that was re-examined,[10] and this was the unmistakable import of the *Boys Markets* accommodation itself:

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[9] *Bro. of Railroad Trainmen v. Chicago River & Ind. R. Co.*, 353 U.S. 30, 40 (1957).

[10] "[W]e re-examine the holding . . . that the anti-injunction provisions of the Norris-LaGuardia Act preclude . . . enjoining a strike in breach of a no-strike obligation . . . even though that agree-

> "When a strike is sought to be enjoined because it is over a grievance which both parties are contractually bound to arbitrate, the District Court may issue no injunctive order until it first holds that the contract *does* have that effect; and the employer should be ordered to arbitrate, as a condition of his obtaining an injunction against the strike." 398 US at 254 (emphasis in original).

The strike must be "over" an arbitrable grievance, this Court reasoned, to avoid depriving the union of "any practicable means of pressing its claim" and thus give effect to Norris-LaGuardia's "central purpose" of fostering the "growth and viability" of labor organizations.[11]

Indeed, the dissenting opinion by Mr. Justice Brennan in *Sinclair*, expressly adopted and approved in full by this Court in *Boys Markets*,[12] is clear that, to effectuate Norris-LaGuardia's "core purpose", an injunction may issue only if the strike is caused by an arbitrable dispute. The employer's "specifically enforceable" duty to resolve the underlying worker complaint through arbitration, he reasoned, eliminated "one of the problems to which Norris-LaGuardia was chiefly addressed"; namely, that

> "the injunction strips labor of its primary weapon without substituting any reasonable alternative." 370 US at 218.

Thus "strikes over grievances which have been routed to arbitration" threaten to "sabotage" effective enforcement of arbi-

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ment contains provisions . . . for binding arbitration of the grievance dispute *concerning which the strike was called*." 398 U.S. at 237-238 (emphasis supplied).

[11] 398 U.S. at 252-253. "[W]here the underlying dispute is arbitrable, the union is not deprived of any practicable means of pressing its claim but is only required to submit the dispute to the impartial tribunal that it has agreed to establish for this purpose." (n. 22).

[12] 398 U.S. at 249, 254.

tration agreements, *i.e.*, force employer capitulation to "effectively 'defeat the jurisdiction' of the arbitrator" over the underlying dispute.[13] But there is "no general federal anti-strike policy" and strikes which, "while they are breaches of private contracts do not threaten any additional public policy, in such cases, the anti-injunction policy of Norris-LaGuardia should prevail."[14]

Accordingly, where the only dispute which is arbitrable is the legality of the work stoppage itself, the injunction has stripped employees of that "reasonable alternative" to use of their primary weapon which is crucial to the Norris-LaGuardia component of the *Boys Markets* accommodation, although the work stoppage threatens no sabotage of the arbitral process.[15]

Furthermore, if any doubt must be resolved in favor of a claim that an arbitrator might hold the work stoppage to breach some express or implied term of the agreement, then a gaping hole has been opened in the Norris-LaGuardia Act that would allow federal court injunctions against many contractually *permitted* worker self-help measures. To check such mischief, *Gateway Coal*, following *Boys Markets*, teaches that the *court* must decide whether the union breached a "contractual duty not to strike" before issuing the injunction. 38 L. Ed. 2d at 593. Yet the decision below left that crucial issue to the arbitrator. Failure to adhere to the "underyling cause" requirement of *Boys*

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[13] 370 U.S. at 219, 224-225.

[14] 370 U.S. at 225.

[15] St. Antoine, "Interventionism, Laissez-Faire and Stare Decisis: The Labor Decisions of the Supreme Court, Oct. Term 1969", *Sect. of Labor Relations Law, American Bar Assoc.*, 1970 Proc., Vol. 1, pp. 166: "[It is Justice Brennan's thesis that an injunction against a strike does not undercut the policy of Norris-LaGuardia so long as the union is not *left defenseless*, but instead can invoke binding arbitration *as an alternative* to striking" (emphasis supplied).

Markets has led the Third Circuit to these direct and fundamental conflicts with controlling principles established by this Court.

II. The Decision Below Presents an Important Statutory Question on Which the Courts of Appeal Are in Direct Conflict.

The decision of the Third Circuit in this case is in direct conflict with the decision of the Fifth Circuit in *Amstar Corp. v. Amalgamated Meat Cutters and Butcher Workmen*, 468 F. 2d 1372 (5th Cir., 1972). *Amstar* holds that work stoppages resulting from extension of picket lines by a striking union to another plant where workers are covered by a collective agreement containing unlimited no-strike and broad arbitration provisions cannot be enjoined. The Fifth Circuit construes *Boys Markets* to permit injunctive relief "only if the underlying dispute 'over' which the strike has been called is arbitrable" and not when "the strike itself precipitated the dispute—the validity under the Union's no-strike obligation of the member-employees honoring the [other union's] picket line," 468 F. 2d at 1373. In this case the Third Circuit held directly to the contrary.

The majority below sought to distinguish *Amstar* on the ground that Amstar's collective agreement contained no provisions "restricting" the union's right to honor picket lines. However, that agreement prohibited any "stoppage" authorized or encouraged by the union and the district court found that these terms "more than sufficiently treat the subject matter of this dispute."[16] This Court holds that "no cessation of work" language of this type, absent an express provision to the contrary, not merely restricts but interdicts the refusal to cross picket

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[16] *Amstar Corp. v. Amalgamated Meat Cutters, etc.*, 337 F. Supp. 810, 815 (E.D. La. 1972).

lines.[17] That NPI's agreement contains picket line provisions limited only as required by § 8(e) of the LMRA, 73 Stat. 541, 29 U.S.C. § 158(e),[18] is, as the dissenters below correctly observed, no sensible basis for distinguishing *Amstar*. Indeed, the Fourth Circuit makes no such attempt. There, sympathetic work stoppages may be enjoined whether, as in *Monongahela*,[19] the agreement is silent as to picket lines but contains broad no-strike provisions or, as in *Pilot*,[20] it contains language which expressly permits refusals to cross primary picket lines.[21] Neither the Third nor the Fourth Circuits holdings, then, can be reconciled with the *Amstar* holding, on the same essential facts, that Norris-LaGuardia bars injunctive relief when the only arbitrable dispute is the legality of the work stoppage rather than its underlying cause.[22]

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[17] *NLRB v. Rockaway News Supply Co.*, 345 U.S. 71, 79-80 (1953).

[18] *Drivers, etc. Local 695 v. NLRB*, 361 F. 2d 547, 550-551 (D.C. Cir., 1966); *Truckdrivers, etc. Local 413 v. NLRB*, 334 F. 2d 539, 542-543 (D.C. Cir., 1964).

[19] *Monongahela Power Co. v. IBEW*, 484 F.2d 1209 (4th Cir. 1973).

[20] *Pilot Freight Carriers, Inc. v. Int. Bro. of Teamsters*, 497 F.2d 311 (4th Cir. 1974)..

[21] District courts of the Fifth Circuit and elsewhere have also refused to distinguish *Amstar* in cases where the collective agreements privileged individual employees to refuse to cross a primary picket line. *The Carnation Company v. Sales Drivers, etc. Local No. 949*, — F. Supp. —, 84 LRRM 5012 (S.D. Tex., 1974); *Pilot Freight Carriers, Inc. v. Local 560, Int. Bro. of Teamsters*, 373 F. Supp. 13 (D.N.J., 1974). Contrary to the Third and Fourth Circuits, the Second Circuit gives a hospitable reading to contractual reservations of the right to strike, barring *Boys Markets* injunctions wherever the Union presents "colorable claim" to the right. *Standard Food Products Corp. v. Brandenburg*, 436 F.2d 964, 966 (2d Cir. 1970).

[22] Where, as here, no-strike commitments are limited to the pending of disputes in the grievance-arbitration procedure, employees who engage in sympathetic work stoppages are protected by § 7 of the NLRA. *Cary-Hobart Water Corp.*, 210 NLRB No. 87; *Hoff-*

In sum, the difference between the Fifth and the Third and Fourth Circuits comes down to a disagreement as to the meaning of *Boys Markets*, a disagreement of far reaching importance that only this Court can resolve. The issue is a recurrent one vital to the organized economic strength of workingmen who must deal effectively with a multi-plant enterprise or an employer whose workers are organized by craft or department. The contract language in question, arising not from the agreement of the parties but from the operation of federal labor legislation, covers hundreds of thousands of workers in every circuit in the nation. When the conflict pertains to the availability or non-availability of the labor injunction in various courts, as *Boys Markets* teaches, the federal policy of labor law uniformity is "seriously offended." 398 U.S. at 245-246. To return to uniformity in the enforcement of arbitration agreements as well as to restore vitality in the Norris-LaGuardia Act, certiorari should be granted in this case.

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man Beverage Co., 163 NLRB 981. Only the *Amstar* view of *Boys Markets* would preclude federal court restraint of the exercise of such rights.

CONCLUSION

For the reasons stated above, this petition for certiorari should be granted.

Respectfully submitted

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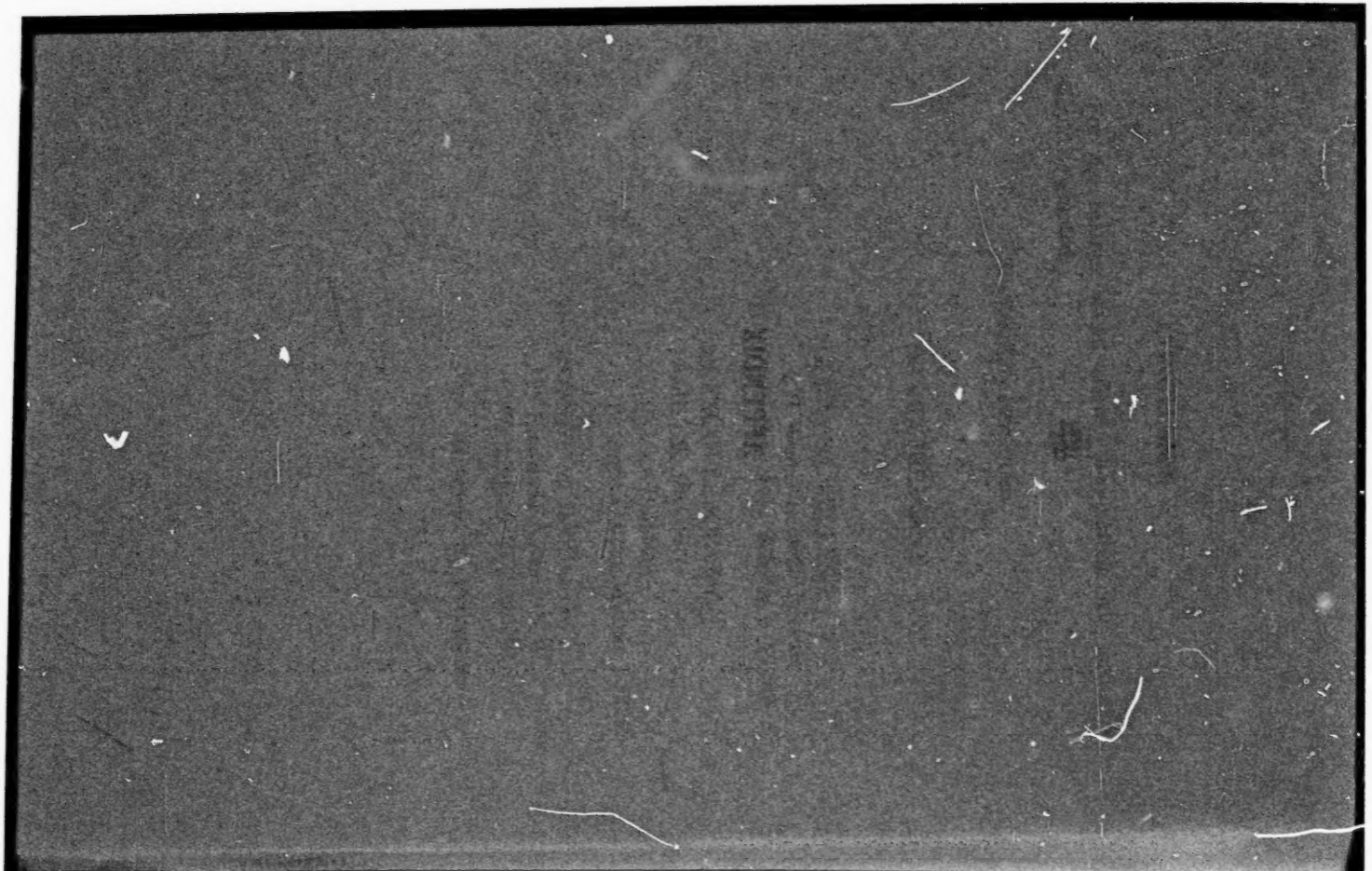

APPENDIX A

United States Court of Appeals
for the Third Circuit

No. 73-1798

NAPA Pittsburgh, Inc., Appellee,

v.

Automotive Chauffeurs, Parts and Garage Employees, Local Union 926, et al., Appellants.

Appeal from the United States District Court
for the Western District of Pennsylvania
Civil Action No. 73-0764

Argued February 28, 1974

Before: Hunter and Weis, *Circuit Judges*, and Becker, *District Judge*.

Submitted in banc June 12, 1974

Before: Seitz, *Chief Judge*, and Van Dusen, Aldisert, Adams, Gibbons, Rosenn, Hunter, Weis and Garth, *Circuit Judges*.

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OPINION OF THE COURT

(Filed August 8, 1974)

Weis, *Circuit Judge.*

This is an appeal from an order enjoining appellant Automotive Chauffeurs, Parts and Garage Employees, Local Union No. 926 (Local 926) from refusing to cross a picket line maintained by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 110 (Local 110). The question presented is whether the district court erred in issuing a preliminary injunction against Local 926 and in ordering arbitration of the differences between the parties in accordance with the provision of the collective bargaining agreement. We conclude that the action of the trial court was proper and we affirm.[1]

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[1] After the appeal in this case was filed, appellee submitted a motion to dismiss that suggested the issue had become moot since Local

Plaintiff-Appellee, NAPA Pittsburgh, Inc., is a corporation with its executive offices and principal place of business on Hamilton Avenue in Pittsburgh, Pennsylvania. Appellant, Local 926, represents approximately 54 of 110 employees at the Hamilton Avenue facility for collective bargaining purposes. A work stoppage occurred at this location as a result of the efforts of a second union, Local 110, to represent the employees of a company located in Altoona, Pennsylvania, doing business under the name of NAPA Altoona, Inc.[2] In order to promote its endeavors, Local 110 called a strike at the Altoona facility and began picketing there. For reasons that do not appear in the record, they decided to extend the picketing to the NAPA Pittsburgh building on Hamilton Avenue.

When this occurred, appellant, Local 926, informed its Hamilton Avenue members that they could refuse to cross Local 110's picket line. The union based this position on Article XIII of its collective bargaining agreement with appellee, which provides:

> "It shall not be a violation of this Agreement . . . in the event an employee refuses to enter upon any property

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110 was no longer maintaining a picket line. This claim is without merit. Appellee posted a $5,000 bond to indemnify appellant for attorneys' fees and any injury suffered in the event it would be determined that the injunction was improvidently granted. Since appellant's right to indemnification depends upon a decision on the merits, the case is not moot. Liner v. Jafco, 375 U.S. 301 (1964).

[2] The district court never determined the exact relationship between plaintiff-appellee NAPA Pittsburgh and NAPA Altoona. However, appellee concedes that NAPA Pittsburgh had "potential control" of NAPA Altoona (Brief of Appellee at 3.) and at the hearing before the district court held September 7, 1973 appellee's attorney indicated his belief that the two companies had interlocking directorships and, in most cases, common officers (Appendix at 43a.). Appellant asserts that the two are in fact a single company with headquarters at Hamilton Avenue in Pittsburgh. Clarification of this relationship would be important to determine the question of whether the picket line was primary or secondary.

> involved in a primary labor dispute or refuses to go through or work behind any primary picket lines . . . at the Employer's [NAPA Pittsburgh's] place or places of business."

As a result of this stand, a work stoppage occurred at the Hamilton Avenue facility.

NAPA Pittsburgh's response was to seek injunctive relief from the district court. The company argued that a question existed as to whether the picket line that Local 926 chose to honor was "primary" within the meaning of Article XIII, and contended that this issue was subject to the mandatory arbitration and no strike provisions contained in the collective bargaining agreement. The circumstances thus were alleged to bring the case within the *Boys Markets* exception to the anti-injunction provisions of the Norris-LaGuardia Act.[3]

After a hearing, the district court found that the employees' right to honor a picket line at the Hamilton Avenue plant was limited by the terms of the collective bargaining agreement and that the arbitration clause provided the compulsory method of resolving a dispute over the exercise of the privilege. *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970) was held to be applicable, and a preliminary injunction was issued ordering that the work stoppage be ended and the parties begin arbitration of their differences.

In cases of this nature we start with the basic premise that the law favors arbitration of labor disputes. That there can be no doubt about this is clear from the pronouncements of the

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[3] The company here concedes that the NLRB has authority to secure an injunction against secondary picketing but contends that this does not deprive the employer of the right to seek an injunction under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. We agree that this is a correct statement of the law. *See* Arnold v. Carpenters District Council, — U.S. —, 42 U.S.L.W. 4754 (U.S. May 20, 1974).

Supreme Court in the Steelworkers' Trilogy—*United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). The most recent reaffirmation of the policy may be found in *Gateway Coal Co. v. United Mine Workers of America, et al.*, 42 U.S. L.W. 4095 (U.S. Jan. 8, 1974).

Boys Markets, Inc. v. Retail Clerks Union, Local 770, supra, holds in essence that where a matter has been made arbitrable by the terms of a contract between the union and the company, an injunction may be issued to enforce this method of settling controversies between the parties. In determining whether a matter is arbitrable under the contract, any doubt should be resolved in favor of arbitration. *United Steelworkers v. Warrior & Gulf Navigation, supra.*

Here, the parties agreed to arbitrate ". . . any and all grievances, complaints or disputes arising between the employer and the union . . ." The collective bargaining agreement also provided that it would not be a violation of the contract if an employee honored a primary picket line. Obviously then, it would be a breach of the agreement if the employees honored a picket line which was not primary.

The contractual provisions are clear but the parties disagree as to whether the picket line involved in this case was "primary." The union says that it was; the company denied it.[4]

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[4] In his memorandum of September 11, 1973, the district judge wrote:

> "The testimony showed that Local 926 instructed its members that it would not be a violation of its contract if any of the members refused to enter upon the premises at 6550 Hamilton Avenue because this was a primary picket line and the contract specifically provided it would not be a cause for discharge or disciplinary action for an employee to refuse to enter the

Both contend vigorously that they are correct. This is clearly a "dispute" and hence covered by the contractual requirement of arbitration.

If it should be determined that a "primary" picket line was present at the plaintiff's plant, then unquestionably Local 926 could refuse to cross. If it was "secondary," then the company had the right to insist that the union honor its no strike agreement.

The union relies on the holdings of *Amstar Corp. v. Amalgamated Meat Cutters & Butcher Workmen*, 468 F. 2d 1372 (5th Cir. 1972); *General Cable Corp. v. International Brotherhood of Electrical Workers*, 331 F. Supp. 478 (D.C. Md. 1971); and *Simplex Wire and Cable Co. v. Local 2208 of the International Brotherhood of Electrical Workers*, 314 F. Supp. 885 (D.C. N.H. 1970), but these opinions are clearly distinguishable. In none of the cited cases was there a contractual provision restricting the union's right to honor picket lines of other labor organizations. Indeed, the district court in the *Simplex* case, *supra*, specifically noted the omission of any reference to the subject in the contract between the parties in that case.

By way of contrast, the Court of Appeals in *Monongahela Power Co. v. IBEW*, 484 F. 2d 1209 (4th Cir. 1973), held that an injunction could be issued to enforce a no strike clause in a contract even though it had no provision applicable to hon-

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premises where there was a primary picket line." (Appendix at 49a)

* * * * * * * *

"The alleged dispute in the instant case concerns the honoring of another union's picket line." (Appendix at 51a)

During the hearing before the district court, counsel for the union also made clear that he was contending that the picket line was primary. (Appendix at 42a-45a)

The record in the district court makes clear that the disagreement between the parties revolves around the pivotal issue of whether there was a primary picket line. *See* Boys Market v. Retail Clerks Union, Local 770, *supra* at 237-38, 254.

oring a picket line of another union. In a later case, *Pilot Freight Carriers v. Teamsters*, — F. 2d — (No. 74-8036, 4th Cir. May 3, 1974), the same court sustained an injunction against a union honoring a picket line where the contract contained language similar to the one *sub judice*, and held that the matter was arbitrable.

We hold that determination of whether the picket line should be classified as primary or secondary was arbitrable under the terms of the contract and pending resolution of the question Local 926 was properly enjoined from causing a work cessation. Requiring arbitration does not nullify the union's right to honor a primary picket line, but only suspends the exercise of the right until its existence is established by an arbitrator's decision. Undue delay should not be permitted since the district court has ample authority in the exercise of its equitable powers to see to it that arbitration proceeds promptly and expeditiously.

The order of the district court will be affirmed.

To the clerk: Please file the foregoing opinion.

NAPA Pittsburgh, Inc. v. Automotive Chauffeurs, Parts and Garage Employees, Local Union 926

No. 73-1798

Hunter, *Circuit Judge*, with whom Seitz, *Chief Judge*, joins, dissenting:

The majority begins its discussion of the merits of the case by referring to "the basic premise that the law favors arbitration of labor disputes." It then goes on to emphasize one key point: that the dispute between the Company and Local 926—over whether Local 110's picket line is primary or secondary and

thus whether Local 926's work stoppage is legal—is an arbitrable dispute. Our response is wholehearted agreement. The law does favor arbitration in this area, and the dispute over the nature of the Local 110 picket line *is* arbitrable. Moreover, we note that the district court found the issue to be arbitrable *and that the appellant Union does not dispute this finding*.[1]

We feel that this last point is of great significance in view of the position taken by the majority. Since everyone, including the appellant union, agrees that this issue is arbitrable, the majority's conclusion that the Company-Local 926 dispute is arbitrable, while undoubtedly correct, does not address itself to the issue raised by appellant and therefore cannot resolve the question presented by this appeal.

Thus, we must begin with a formulation of the issue we are called upon to resolve. In our opinion that issue can be framed in the following way: given the fact that the issue as to the legality of the Local 926 work stoppage is arbitrable, should the district court be able to involve itself in this dispute by enjoining the work stoppage until an arbitrator can decide its legality?

One possible resolution of this question is to conclude that the federal courts can always intervene and issue an injunction against a strike whenever the resolution of an arbitrable dispute might end it.[2] This is the implicit conclusion of the majority.

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[1] The appellant does argue at great length that the "underlying" dispute is not arbitrable. However, as it makes clear even in the initial statement of its first argument, the dispute that it refers to as the "underlying dispute" is the fight between the Company and Local 110 (Brief of appellant at 7). Since this dispute did not concern Local 926 in any way, it obviously was not arbitrable under the terms of Company-Local 926 collective bargaining agreement.

With regard to the Company-Local 926 dispute as to the legality of the Local 926 work stoppage, appellant's brief never takes issue with the district court's finding of arbitrability.

[2] Here, resolution of the arbitrable issue will end the work stoppage if the arbitrator rules in the Company's favor. Obviously, if the union wins, the work stoppage will continue.

Since we feel this decision is not supported either by a reasoned balancing of the legal policies at stake or by the precedent, we dissent.

I. Policy Considerations

Once we get beyond the majority's discussion of the arbitrability of the primary-secondary issue, its decision rests primarily upon the Supreme Court's decision in *Boys Markets*.[3] Our disagreement with their holding comes down to a disagreement over the scope of the rule first enunciated in that case. However, we will defer our explanation of the *Boys Markets* holding until we have reviewed the policy impact of *Boys Markets* and contrasted it with the policy impact of the majority's decision in this case. We do this because we believe that the key to understanding the scope of the *Boys Markets* rule (and its lack of applicability here) lies in an understanding of its intended impact upon competing legal policies.

Boys Markets involved a dispute between an employer and union over the right of union employees to perform certain tasks at the employer's store. This was a dispute that the Union, in its collective bargaining agreement, had agreed to resolve through the presentation of reasoned arguments to a neutral arbitrator, rather than through the use of economic force, i.e., by means of a strike. However, in that case, the union ignored both its no strike pledge and its agreement to arbitrate the issue and struck for the avowed purpose of forcing a favorable resolution to the arbitrable dispute. Thus, the union's actions made it clear that they did not intend to return to work until the Company conceded that the tasks involved had to be performed by union men.

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[3] *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970).

Clearly, this strike had the effect of undermining the rule of law that favors the arbitration of labor disputes, since the strike was an attempt to force a union victory on the very issue that was made arbitrable not through the presentation of reasoned arguments to a neutral arbitrator, but rather through the use of sheer economic force. If the tactic had been successful, it would have settled the arbitrable dispute, making arbitration superfluous and thereby defeating the arbitrator's jurisdiction. Thus, the strike represented a plain attempt by the union to undermine and avoid its agreement to arbitrate the issue in dispute and the legal policy that favors the arbitration of labor disputes cut clearly in favor of having the district court issue an injunction to end the work stoppage.

However, the Court could not decide the case with a simple citation to this policy effect, for through the issuance of an injunction ordering an end to the strike plainly promoted arbitration, it just as plainly interfered with the clear policy directive of Congress contained in the Norris-LaGuardia Act, 29 U.S.C. § 104 (1970)). That section in essence strips federal courts of the power to enjoin strikes.[4] Faced with this clear conflict between two polices of law, the Supreme Court chose to create a "narrow"[5] exception to the anti-injunction provisions of the Norris-LaGuardia Act so that the court had the power to prevent the Union from undertaking a course of conduct that was plainly designed to circumvent and defeat its explicit agreement to arbitrate.

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[4] "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

"(a) Ceasing or refusing to perform any work or to remain in any relation of employment; . . ." 29 U.S.C. § 104.

[5] 398 U.S. at 253.

In the instant case, the policy considerations that provide the *raison d'etre* for the Boys Markets decision are totally absent. Stated simply, while the policy enunciated in the anti-injunction provisions of the Norris-LaGuardia Act will be frustrated here just as it was in *Boys Markets* if an injunction is issued, the policy that favors the arbitration of labor disputes will in no way be undermined if the injunction requested here is denied.

In *Boys Markets* the strike was designed to pressure the Company into capitulating on the arbitrable issue before it could present its position to the arbitrator. In the present case, no similar situation exists. It is true that here, as in *Boys Markets*, there is a dispute that is clearly arbitrable—that is, the dispute over the nature of the Local 110 picket line and hence the legality of the Local 926 work stoppage. However, in this case, unlike *Boys Markets, the union's work stoppage is not designed to force settlement of this arbitrable issue before arbitration can take place; it is not an attempt to defeat the arbitrator's jurisdiction.*

We can state this conclusion without equivocation because of the undisputed facts in this case. Local 926 engaged in its work stoppage only because of the presence of Local 110's picket line. The work stoppage was not begun, nor was it continued, because of the union's disagreement with the Company over the arbitrable issue; that is, over its right to engage in a work stoppage. As a result, no concession that the Company could have made on this issue would have helped to end the walkout. The goal could be attained by the Company only if it resolved its dispute with Local 110 and thus caused that union to remove its picket line.

Since this is true, the work stoppage could have exerted no pressure upon the Company to give up its fight on the arbitrable issue and forego arbitration since resolution of the arbitrable dispute prior to arbitration would have brought nothing in return: the work stoppage would have continued in any event. Thus,

the work stoppage placed no pressure on the Company to forego arbitration.[6]

This fact makes the policy considerations operative here crucially different from those that were present in *Boys Markets*. In that case, the Court enjoined a strike that was specifically undertaken in order to force a resolution to the arbitrable dispute and therefore to circumvent arbitration; here, the work stoppage exerted no pressure on the Company to resolve the arbitrable issue short of arbitration.[7] As a result, while in *Boys Markets* the strike deterred the employer from pursuing arbitration, thus making it necessary to enjoin the strike in order to promote the policy favoring arbitration, no similar situation exists here. In this case, since the work stoppage does not pressure the Company to forego arbitration, the issuance of a *Boys Markets* injunction will do nothing to promote the arbitration of labor disputes, and its issuance cannot be supported by the policy considerations that underly *Boys Markets*.

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[6] If Local 926, after walking out in recognition of the Local 110 picket line, had said that the men would not return until the pickets were removed, *and also until the Company recognized their right to honor that picket line* under the collective bargaining agreement, then the situation would be different. Under these facts, it could fairly be said that the union was trying to prevail on the merits of the arbitrable issue by employing economic force rather than by employing reasoned arguments before a neutral arbitrator, and the work stoppage would then be an effort to resolve the merits of the dispute in a way that rendered the arbitrator's jurisdiction ineffective. At that point, we would be in the true *Boys Markets* situation and, under the holding of that case, the issuance of an injunction would be sustainable. However, as we note in the text, the facts of the present case are otherwise.

[7] One might object to this blanket statement by arguing that the work stoppage does discourage arbitration, indirectly, by pressuring the Company to settle its dispute with Local 110. If the company did, in fact, give in to this pressure, the pickets would be removed, the work stoppage would end, and resolution of the primary-secondary dispute would become totally irrelevant, thereby defeating the arbitrator's jurisdiction.

The fallacy in this argument lies in the assumption that resolution of the Company-Local 110 dispute would make an arbitrator's deci-

However, one might object that while the factors we discuss above make it clear that the issuance of an injunction in this case will not promote arbitration in the same way that it was promoted by the injunction in *Boys Markets*, the majority's decision might still promote that goal by other means. We do not think that this suggestion can withstand analysis. In fact, in our opinion, the overall effect of the majority's decision is to actually *discourage* the arbitration of labor dispute.

If no injunction is permitted in this case, employers who in the future are placed in the situation faced by NAPA Pittsburgh will have every reason to seek arbitration since they will be able to end the work stoppage only by prevailing on the merits. However, if we affirm the district court and allow it to enjoin the work stoppage pending arbitration, employers in future cases will have everything to lose and nothing to gain from arbitration. Thus, we will be giving them every incentive to avoid and obstruct arbitration by every means at their disposal.

This unfortunate effect will occur because of the peculiarly limited role that the court plays in a case such as this. The district courts cannot look at the merits of these disputes since that is the province of the arbitrator. All they can do is review the circumstances of the case to see if an arbitrable issue exists and issue an injunction if the requirements of *Boys Markets* are met. As a result, the majority's interpretation of the *Boys*

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sion in the primary-secondary issue superfluous. This assumption is wrong for two reasons. First, the company, if correct on the merits, would still have a cause of action for the damages against Local 926, and would need the arbitrator's decision in order to pursue it. Second, if the Company wished to discipline or discharge any of the employees who engaged in the work stoppage the issue of its legality would also have to be arbitrated.

In the true *Boys Markets* situation the employer would not be free to pursue arbitration for these reasons since he would have already conceded on the arbitable issue. Thus, his continued pursuit of arbitration would amount to a renunciation of his concession of the arbitable dispute and would invite a renewal of the work stoppage.

Markets holding creates a situation where an employer can end any work stoppage simply by going to the district court and *alleging* that under the terms of the collective bargaining agreement the work stoppage itself is illegal.[8]

The advantage that an employer enjoys in initiating this sort of proceeding, instead of pursuing arbitration of the merits is apparent. In arbitration he runs the risk of losing on the merits; before the district court no such risk exists since the merits are never reached. Thus, we can safely assume that employers who in the future are faced with work stoppages similar to the one that faced the company in this case, will seek their initial relief in federal court rather than through arbitration.

Moreover, once the district court has issued its injunction, the employer will have everything he seeks, since the work stoppage will have been ended. As a result, he will no longer have anything to gain from arbitration.[9] On the other hand, arbitration might conceivably be very costly to him, since once the merits of the issue are reached, he will always run some risk of losing and a defeat on the merits would cause the injunction to lapse, raising the possibility of a renewal of the work stoppage. Thus, a rational employer will not only avoid initiating arbitration, he will use every means at his disposal to delay it as long as possible.

We think it is clear that a rule that gives one party every incentive for avoiding the arbitration will inhibit the smooth func-

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[8] Since issues arising out of differing interpretations of the terms of the collective baragaining agreement are arbitrable under most arbitration clauses, these allegations will be sufficient to elicit an injunction ending the work stoppage.

[9] It is true that the company may eventually need a favorable decision on the merits if it wants to sue the union for the damage caused during the pre-injunction period when the strike was still in progress. However, since these damages can be collected many months after the event, the company can delay arbitration to the maximum extent possible and still not jeopardize its right to monetary relief.

tioning of that procedure. As a result, it is our conclusion that the majority's opinion, rather than promoting the arbitration of labor disputes, will actually tend to discourage it.

We can see two objections that might be raised in an attempt to refute this conclusion. The first would concede that the issuance of an injunction here would discourage future employers from seeking or submitting to arbitration, but argues that the opposite result would only encourage equal recalcitrance on the part of the union. If this is true, it would obviously eliminate the negative policy impact we have outlined above. The second objection is raised by the majority and it also concedes (at least, by implication) that the issuance of an injunction will make obstruction of arbitration useful from the employer's point of view. However, this argument then suggests that undue delay can be controlled by the district court through the use of its equitable powers.[10]

We do not believe that either of these arguments can withstand close scrutiny. With regard to the first, we think it is clear that the refusal to permit the issuance of an injunction in factual situations such as this would not place the union in a situation similar to that faced by the employer when an injunction can issue. As we have seen, if an injunction is issued, employers are given every reason to avoid and delay arbitration. However, if no injunction is issued, the union does not have the same incentive to seek delay for it will ultimately be liable in damages if it is, in fact, engaged in an illegal work stoppage. Thus, while obstruction and delay of the arbitration proceeding might permit the union to continue an illegal work stoppage for some period of time, this gain will only come at a significant cost since it would increase the union's monetary liability to the same extent.

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[10] As the majority opinion puts it, "Undue delay should not be permitted since the district court has ample authority in the exercise of its equitable powers to see to it that arbitration proceeds promptly and expeditiously."

As far as the second argument is concerned, it is true that the district court can use its equitable powers to seek to control undue delay. However, we do not feel that there is any reasonable way that a district court can use this power to prevent significant delay when that goal is sought by one of the parties.

In this case, for example, the employer can delay arbitration for nine days simply by using all of the time that is alloted to it at each step in the grievance procedures that leads to arbitration.[11] Moreover, this nine day figure does not include the time that it will take for the Board established by the "Third" paragraph to deliberate on the matter, nor does it include the time needed (under the "Fourth" paragraph) to choose a neutral arbitrator, to bring the arbitration panel together, and to have the panel hear and decide the dispute. Obviously, these steps will use additional time in any event, and also provide a determined employer with further opportunities for stretching out the time needed to complete arbitration.

As a result, the employer will be able to delay the arbitration proceedings for at least several weeks, and throughout this pe-

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[11] The relevant Article of the collective bargaining agreement reads as follows:

"Article XI—Grievance Procedure

"Any and all grievances, complaints or disputes arising between the Employer and the Union or any employee represented by the Union and covered by this Agreement shall be settled in the following manner:

"FIRST: All complaints or grievances shall be in writing and be filed by the grieving party within 48 hours, and shall be taken up by the Steward and the Employer or Representative of the Employer in the first instance and they shall endeavor to arrive at a settlement of the dispute within 48 hours.

"SECOND: Failing to agree, the shop Steward shall report the matter to the Union and the Union shall submit it in writing within three (3) days and attempt to adjust the same with the Employer within three (3) days.

"THIRD: Upon failure to agree and upon request of either the Union or the Employer, the matter shall be submitted within

riod, the work stoppage will be enjoined. Since strikes like the present one are a response to specific disputes over which the union has no control, they are highly dependent upon timing for their success, and a minimum delay of this magnitude will render many of them ineffective. Thus, the incentive for the delay of arbitration by the employers, that is created by the issuance of an injunction in this case, cannot be effectively controlled by the district court's equitable powers.

Our conclusion therefore is that the Local 926 work stoppage did not have a negative impact, overall, on the goal of promoting the arbitration of labor disputes and that as a result the policies considerations that led to the creation of the *Boys Markets* rule do not support the issuance of an injunction in this case.

II. The Holding in Boys Markets

While our analysis of the policy considerations underlying *Boys Markets* leads us to the conclusion that an injunction

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48 hours to a Board made up of two (2) representatives selected by each party for the purposes of hearing and attempting to adjust the matter.

"FOURTH: In the event the matter cannot be adjusted by the method set forth above, or in case of any other disputes arising under this contract pertaining to its meaning or application, each party shall forthwith name one (1) arbitrator and the two (2) so chosen shall within forty-eight (48) hours name a neutral arbitrator. If the two do not agree upon a neutral arbitrator within 48 hours, the Director of the U.S. Mediation and Conciliation Service shall be requested to name a panel of five (5) suggested neutral arbitrators. The arbitrators named by the parties will then select the neutral arbitrator from such panel by each eliminating two of the arbitrators on the suggested panel submitted by the Director of the U.S. Mediation and Conciliation Service. The expense of the neutral, if any, shall be shared equally by the parties. Each party agrees to accept and abide by an award made by the majority of the Arbitration Board so constituted.

"FIFTH: There shall be no cessation of work during the pendency of the grievance proceedings."

should not issue in this case, we must still deal with the suggestion, implicit in the majority's holding, that the rule created in that case encompasses the factual situation presented here. If this is true, then policy considerations notwithstanding, the issuance of an injunction was permissible.

The majority characterizes the *Boys Markets* holding as follows:

> "[Boys Markets] holds in essence that where a matter has been made arbitrable by the terms of a contract between the union and the company, an injunction may be issued to enforce this method of settling controversies between the parties."

If these words are meant literally then the majority has misapplied its own rule under the facts presented here. Both parties agree that the "primary-secondary" issue is arbitrable and, as explained above, the union never tried to short circuit arbitration of that dispute by means of the work stoppage. As a result, there was no need to issue an injunction to "enforce this method of settling controversies between the parties," since there was never an attempt by the union to resolve the only arbitrable dispute by any other means.

However, since the majority affirms the issuance of the injunction, we assume that it reads the *Boys Markets* rule to permit the issuance of an injunction whenever arbitration might ultimately have the effect of ending a work stoppage.[12] We cannot agree with this expansive reading of the case. Not only does it run counter to the policy considerations that underly the *Boys Markets* decision, it also ignores the language that carefully limits its holding.

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[12] Here, arbitration would have ended the work stoppage if the company had prevailed on the merits of the dispute. However, if the union had prevailed on the merits then arbitration would have had no effect on the work stoppage.

As we noted earlier, in *Boys Markets* a dispute arose over the right of union employees to perform certain tasks at the employer's store and the union called a strike in an effort to force the Company to capitulate on that issue, despite the fact that it had agreed to seek resolution of this kind of dispute through the use of arbitration, rather than by means of a strike. Under these facts the Court held that since the strike was *"over* a grievance which both parties are contractually bound to arbitrate," 398 U.S. at 254 (emphasis added), an exception to the board anti-injunction provisions of the Norris-LaGuardia Act was appropriate and an injunction could issue. In addition, it carefully spelled out the circumstances under which such an injunction could issue and emphasized the limited nature of its decision by stating that, "[o]ur holding in the present case is a narrow one. We do not undermine the vitality of the Norris-LaGuardia Act." 398 U.S. at 253.

In our opinion, the import of this careful language is clear. An injunction can be issued to end a work stoppage only when an arbitrable issue is itself the "underlying cause" of the strike.[13] We reach this conclusion for three reasons. First, the Court in *Boys Markets* specified that a strike must be "over" an arbitrable dispute if it is to be enjoinable, and in our opinion a strike cannot be described as "over" a dispute unless that dispute is a cause of the work stoppage. Second, the *Boys Markets* decision is, by its own description a "narrow" one. Therefore it should logically be limited by the key factual circumstances that were present in the case. As a result, since the arbitrable dispute in *Boys Markets* (over the right of the union

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[13] As this Court stated in *Parade Publications, Inc. v. Philadelphia*, 459 F.2d 369 (3d Cir. 1972):

> "We read [Boys Markets] to indicate that arbitration should be encouraged by permitting judicial enforcement of a 'no strike' clause when the *underlying issue* is arbitrable but that there should be no injunction if the underlying dispute is not arbitrable." *Id.* at 374 (emphasis added.)

employees to perform the tasks involved) was also the underlying cause of the strike, this is logically a required part of the rule.

Finally, and of greatest significance, we reach this conclusion because, as we discussed at length in Part I of this opinion, a broader reading of the *Boys Markets* holding would extend it into areas where the policy considerations that dictated that decision simply do not operate. If the arbitrable dispute is not a "cause" of the work stoppage, then a concession on that dispute by the employer will not help to end the work stoppage. Under these circumstances, the work stoppage will exert no pressure on the employer to resolve the arbitrable issue short of arbitration. Thus, if this basic cause-effect relationship between arbitrable issue and the strike is not present, the strike will not discourage arbitration and the policy that favors the arbitration of labor disputes will not be furthered by the issuance of an injunction.

Applying this rule to the facts of the present case, it is clear that an injunction should not have issued. Here, the dispute that was the sole underlying cause of the Local 926 work stoppage was the fight between the Company and Local 110 that led to the creation of that union's picket line. This issue was plainly not arbitrable under Company-Local 926 collective bargaining agreement since it did not involve Local 926. Thus, though it caused the strike it provided no reason for the issuance of a *Boys Markets* injunction.

On the other hand, the dispute as to the nature of the Local 110 picket line and thus as to the legality of the Local 926 work stoppage was arbitrable. However, this dispute was never an "underlying cause" of the Local 926 work stoppage since it arose after that work stoppage had begun and never became a basis for its continuation. As a result, the strike never deterred the arbitration of this issue and the existence of this dispute

never provided a basis for the issuance of an injunction under the holding in *Boys Markets.*[14]

Before we close our discussion of the holding in *Boys Markets,* we must finally discuss its relationship to *Gateway Coal Co. v. United Mine Workers,* 414 U.S. 368 (1974). While the majority never articulates the point, we believe that it is influenced by an unstated feeling that *Gateway Coal* has somehow expanded the *Boys Markets* exception to the anti-injunction provisions of the Norris-LaGuardia Act in a way that is relevant here.

We do not believe that a careful reading of that opinion can support this conclusion. In *Gateway Coal,* a strike occurred because the employer attempted to reinstate two suspended foremen who the union felt would pose a safety hazard if allowed

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[14] We note that our interpretation of the scope of the *Boys Markets* decision and our conclusion that a *Boys Markets* injunction should not issue here finds direct support in cases that have been decided by the Fifth Circuit and several district courts on facts almost identical to those presented here. *Amstar Corp. v. Amalgamated Meat Cutters,* 468 F.2d 1372 (5th Cir. 1972); *see, e.g., General Cable Corp. v. Int'l Bhd of Elec. Workers,* 331 F.Supp. 478 (S.Md. 1971); *Simplex Wire and Cable Co. v. Local 2208, Int'l Bhd of Elec. Workers,* 314 F.Supp. 885 (D.N.H. 1970); *but see Monogahela Power Co. v. Local 2332, Electrical Workers,* 484 F.2d 1209 (4th Cir. 1973).

The majority seeks to distinguish this precedent by stating that, "[i]n none of the cited cases was there a contractual provision restricting the union's right to honor picket lines of other labor organizations." However, we are constrained to note that the majority, in its attempt to distinguish these cases, has seized upon a factual difference that in no way supports its implicit conclusion that a *Boys Markets* injunction could be properly denied in the cited cases and still be issued here. In fact, the only conclusion that can sensibly be drawn on the basis of the factual difference noted by the majority is that if a *Boys Markets* injunction should be issued to end the strike here, then there is an even *stronger* reason for concluding that a *Boys Markets* injunction should have been issued in the cited cases.

It is true, as the majority notes, that the collective bargaining agreement in this case contains a clause that was not contained in

to resume their normal responsibilities.[15] The employer responded by seeking a *Boys Markets* injunction.

The right to obtain such an injunction in that case revolved around three key issues that were ultimately settled by the Supreme Court: 1) whether the issue in dispute was truly arbitrable; 2) whether the arbitration clause in the collective bargaining agreement gave rise to an implied no-strike obligation; and 3) whether the circumstances in the case satisfied the traditional equitable considerations that must also be met before a *Boys Markets* injunction can be issued. The Court answered each question affirmatively and concluded that a *Boys Markets* injunction should issue.

The first thing that should be noted is that in *Gateway Coal* the undisputed facts clearly established that the strike was

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the agreements that were in operation in the cited cases. However, to characterize this additional clause as a restriction on the union's right to strike is misleading. Article XIII of the Company-Local 926 collective bargaining agreement does not *restrict* appellant's right to strike. Instead, it *enlarges* that right by creating an exception to the agreement's apparently all inclusive no-strike language. See the "Fifth" paragraph of Article XI, note 12, *supra*. This intent to "enlarge" the union's right to strike is apparent from the language of Article XIII itself:

> "It *shall not be a violation* of this Agreement . . . in the event an employee . . . refused to go through or work behind any primary picket lines at the Employer's place or places of business." (Emphasis added).

In the cases cited, it is true that the agreements contained no clause similar to Article XIII. However, the agreement in each of these cases, like the agreement here, did contain an apparently all inclusive no-strike pledge. As a result, each of the unions in the cited precedent apparently had no right to strike at all, while in this case the union retained a limited right to strike that was arguably applicable under the facts of the case. Thus, the argument in favor of issuing a *Boys Markets* injunction to end the strike was stronger in the cited cases than it is in this case, and their denial of injunctive relief is *a fortiori*, in point here.

[15] These foremen had been suspended from their jobs because they had neglected to make a safety check they were responsible for making and, as a result, had unnecessarily subjected the men to a dangerous condition.

caused by the "arbitrable" dispute over the work status of the two foremen. Thus, since the "underlying cause" requirement of *Boys Markets* was clearly satisfied, that case could not have *held* that that element was no longer a prerequisite to the issuance of a *Boys Markets* injunction.

Second, we can find nothing in the Court's discussion of the issues that were raised in *Gateway Coal* that would suggest that at some point in the future it is likely to hold that the "underlying cause" requirement of *Boys Markets* is no longer operative. As we have noted, this requirement was established in order to limit the availability of *Boys Markets* injunction to those cases in which the work stoppage has the effect of undercutting the arbitration of labor disputes. As a result, as long as the promotion of the arbitration of labor disputes remains the policy rationale that justifies the issuance of *Boys Markets* injunctions, the "underlying cause" requirement will logically remain an integral part of the rule.

We can find nothing in the *Gateway Coal* decision that suggests that this policy goal has been or will be changed. The Court's discussion of the arbitrability of the safety dispute involved in the case, and its discussion of the traditional requirements of equity deal with the existence of additional factors that are plainly required before an injunction can issue under the holding in *Boys Markets*. Its conclusion that these prerequisites were met can support no inference that the underlying policy rationale of the *Boys Markets* rule has been changed or expanded.

The rest of the opinion addresses itself to the question of whether the union's agreement to arbitrate the dispute must be reinforced by an explicit agreement not to strike in order for a *Boys Markets* injunction to issue. The Court concludes that an explicit no-strike clause is not needed since the agreement to arbitrate a dispute implies, in the normal case, a corresponding agreement not to seek its resolution through a strike.

It is true that this part of the *Gateway Coal* opinion does expand the *Boys Markets* holding, since it permits courts to enjoin strikes in the absence of explicit no-strike agreements. However, this extension of the rule in no way changes the policy rationale of *Boys Markets*. On the contrary, it only provides for its logical extension since it allows the district courts to enjoin strikes that undercut agreed upon arbitration regardless of whether those strikes are also explicitly barred by the terms of the collective bargaining agreement.

As a result, nothing in *Gateway Coal* in any way suggests a change in the underlying policy rationale that justifies the *Boys Markets* rule. It is still designed to end strikes if, but only if, they have the effect of undercutting agreed upon arbitration. Since this is true, we can only assume that the "underlying cause" requirement will remain a necessary prerequisite to the issuance of a *Boys Markets* injunction.

III. **Conclusion**

As we stated at the outset, our disagreement with the majority boils down to a dispute as to the meaning of *Boys Markets*. In our opinion, the holding in that case permits the issuance of injunctions to end work stoppage only when an arbitrable dispute is an underlying cause of the strike.

We reach this conclusion, in part, because of the language used to state the holding in that case. However, we are primarily persuaded by our understanding of the policy considerations that underly that decision. In *Boys Markets* the court was faced with a dilemma. On the one hand, it was obliged to give effect to the policy judgment that is embodied in the anti-injunctions provisions of the Norris-LaGuardia Act by refusing to issue an injunction. On the other, it was equally obliged to enjoin the strike since its clear effect was to undercut the policy

that favors the promotion of arbitration of labor disputes. Under these special circumstances, it ruled that an injunction could issue.

It is important to note that the Court's goal was not to end the strike.[16] Instead, its sole purpose was to promote the arbitration of the labor dispute involved by eliminating a serious impediment to that goal. Thus, its rule sensibly permits the enjoining of strikes only when they have the effect of interfering with agreed upon arbitration. As we have noted, a strike can have this effect only when it is caused by the dispute that is supposed to be arbitrated, since only under those circumstances will the strike pressure the employer to capitulate on the arbitrable dispute and therefore forego its arbitration.

Once this "underlying cause" requirement is accepted as an integral part of the *Boys Markets* rule, its application to the facts of this case is mechanical. Here, the underlying cause of the strike was not arbitrable (and the only dispute that was arbitrable was not a cause of the work stoppage). Thus, the work stoppage was not an attempt to force the company to capitulate on the arbitrable dispute and forego arbitration, and the district court erred in enjoining the work stoppage.

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[16] Indeed, it did this most reluctantly in view of the anti-injunctions provisions of the Norris-LaGuardia Act.

NAPA Pittsburgh, Inc. v. Automotive Chauffeurs, Parts and Garage Employees, Local Union 926, No. 73-1798

Adams, Circuit Judge, dissenting:

Judge Hunter's thoughtful and comprehensive opinion reflects to a large extent my own views with respect to the issues presented by this appeal. However, although Judge Hunter, in discussing Boys Markets, Inc. v. Retail Clerks Local 770,[1] does advert to the fundamental jurisprudential principle that courts are to interpret laws and to permit policy considerations to infect their decisions only within statutory interstices, he does not appear to accord that principle the same weight I would in reaching a conclusion that a *Boys Markets* injunction is not appropriate in the circumstances here.

Analysis of the scope of the *Boys Markets* decision must encompass an appreciation of the widespread abhorrence of the labor injunction that existed at the time of the enactment of the Norris-LaGuardia Act.[2] Many viewed the injunction as the principal weapon of those antagonistic to the emerging labor movement. Some courts, it was felt, employed the injunction to effectuate their own policy predilections, predilections that did not attach substantial significance to the interests of the working man. In response to these sentiments, Congress enacted the Norris-LaGuardia Act. The Act expressly deprived the federal courts of jurisdiction to issue labor injunctions in almost all circumstances.[3].

Subsequent developments, however, seemed to temper somewhat the posture of judicial abstention imposed by the Norris-LaGuardia Act. In 1947, Congress enacted Section 301(a) of

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[1] 398 U.S. 235 (1970).

[2] *See generally* Frankfurter & Green, The Labor Injunction (1930).

[3] *Cf.* United States v. UMW, 330 U.S. 258 (1947).

the Labor-Management Relations Act which, by its terms, permits suits for violations of collective bargaining agreements to be brought in federal courts. In Textile Workers Union v. Lincoln Mills,[4] the Supreme Court, in reversing the district court's refusal to compel the employer to arbitrate pursuant to the collective bargaining agreement, held that Section 301(a) calls upon the federal courts to fashion a federal substantive labor law.

Lincoln Mills and the *Steelworkers Trilogy*,[5] which followed three years later, made it apparent that the cornerstone of this judge-made labor law was to be a policy favoring the operation of the arbitral process in resolving labor-management disputes. Inevitably the Supreme Court was faced with the request of an employer, relying on this federal policy favoring arbitration, to enjoin a strike over an arbitrable grievance. The union, of course, interposed the express prohibition against such an injunction contained in the Norris-LaGuardia Act. In 1962, the Court in Sinclair Refining Co. v. Atkinson,[6] held that the Act precluded the issuance of the injunction.

But eight years later, in *Boys Markets*, the Supreme Court reconsidered *Sinclair*. This reconsideration was prompted in part by the "anomalous" situation created when some employers seeking injunctive relief in state courts, which were not subject to limitations like those of the Norris-LaGuardia Act,[7] were

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[4] 353 U.S. 448 (1957).

[5] United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

[6] 370 U.S. 195 (1962).

[7] At the time of *Boys Markets*, "about one-half of the states [had] enacted so-called 'little Norris-LaGuardia Acts' . . ." However, "in only about 14 jurisdictions [was] there a significant Norris-LaGuardia type prohibition against equitable remedies for breach of no-strike obligations." 389 U.S. at 247-48 n.15.

frustrated in their attempts by the unions' removal of the cases to federal courts. Such federal courts proceeded to vacate the state court injunctions on the basis of the Act. The Court overruled *Sinclair* and, as Judge Hunter notes, made a "narrow" exception to the Norris-LaGuardia Act. In so doing, the Court "accommodated" the Act to the federal policy favoring arbitration by permitting an injunction in the carefully circumscribed situation that exists when a work stoppage is over an arbitrable grievance. The Court, nevertheless, emphasized that with its opinion in *Boys Markets* it did "not undermine the vitality of the Norris-LaGuardia Act."[8]

In light of this historical backdrop, it is necessary to approach cases appearing to hover near the parameters of the *Boys Markets* exception to the Norris-LaGuardia Act with an understanding that *Boys Markets* itself may represent the juridiary's most ambitious foray into an area seemingly preempted by statute. Absent a clear signal from the Supreme Court, doubts should be resolved in favor of the applicability of the Norris-LaGuardia Act. When viewed from this perspective, Judge Hunter's analysis is, in my judgment, particularly persuasive.

It may be suggested that Gateway Coal Co. v. United Mine Workers[9] constitutes a direction by the Supreme Court for federal courts to exercise less circumspection than the language of *Boys Markets* would seem to indicate in issuing injunctions in circumstances such as those here. The basis of such a suggestion, so the argument seems to go, is the Court's willingness to imply a no-strike obligation when the collective bargaining agreement did not contain an *express* no-strike provision. However, in Teamsters Local 174 v. Lucas Flour Company,[10] a

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[8] 398 U.S. at 253.

[9] 414 U.S. 368 (1974).

[10] 369 U.S. 95 (1962).

damage action, the Supreme Court, eight years prior to *Boys Markets*, implied a no-strike clause coextensive with the arbitration provision. Therefore, in light of the well-established *Lucas Flour* precedent, the implication of a no-strike clause in the context of a suit to secure a *Boys Markets* injunction was not particularly surprising, and, therefore, cannot be said to amount to a signal to relax the rather strict preconditions placed on the issuance of a labor injunction by the *Boys Markets* decision and set out with specificity by Justice Brennan.[11]

Accordingly, for the reasons so well expressed by Judge Hunter plus those set forth above, I respectfully dissent.

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[11] 398 U.S. 253-55.

APPENDIX B

In the United States District Court for the
Western District of Pennsylvania

NAPA Pittsburgh, Inc.
v.
Automotive Chauffeurs, Parts & Garage Employees, Local Union No. 926, et al.

Civil Action
No. 73-764

MEMORANDUM AND ORDER

Snyder, Jr.

In this case the plaintiff employer, NAPA Pittsburgh, Inc., has sought a temporary restraining order and also injunctive relief against the defendant, Local Union No. 926, Automotive Chauffeurs, Parts and Garage Employees and its officers, restraining them, and all of those in participation with them, from participating in a work stoppage, and seeking mandatory arbitration of an alleged dispute which the plaintiff asserts grows out of, and is covered by, the Collective Bargaining Agreement between the plaintiff and the defendant.

A temporary restraining order was refused and the matter came on for an evidentiary hearing on September 7, 1973. At that time, and primarily by stipulation, it was determined that there was a valid and subsisting labor agreement entered into between the NAPA Pittsburgh Warehouse, Inc. and the Superior Motor Parts Division, including its branch stores located at Northside Pittsburgh; Southside Pittsburgh; Wilkinsburg, Sharpsburg and 6550 Hamilton Avenue, and the Automotive Chauffeurs, Parts & Garage Employees Local Union No. 926,

an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

Under the provisions of Article XI "Any and all grievances, complaints or dispute arising between the Employer and the Union or any employee represented by the Union and covered by this Agreement shall be settled in the following manner." There is then set forth a procedure for filing a complaint or a grievance, a conference between the Steward and a representative of the Employer, a report from the Steward should the matter fail of agreement, a three day period for attempt to adjust the same with the Employer, upon failure to reach agreement, then either party could request that the same be submitted within forty-eight hours to a board made up of two representatives selected by each party for the purposes of hearing and attempting adjust the matter. In the event the matter could not be adjusted, then the same was to be subject to arbitration by an arbitrator selected by each of the parties, who in turn would select a neutral arbitrator. If the two could not agree upon an neutral arbitrator then the Director of the U.S. Mediation and Conciliation Service was to be requested to name a panel of five suggested neutral arbitrators. The arbitrators named by the parties would then select the neutral arbitrator by each arbitrator eliminating two of the arbitrators on the suggested panel as submitted. "There shall be no cessation of work during the pendency of the grievance proceedings."

There is another pertinent provision of the Contract, and that is, that under Article XIII: "It shall not be a violation of this Agreement and it shall not be cause for discharge or disciplinary action in the event an employee refused to enter upon any property involved in a primary labor dispute or refuses to go through or work behind any primary picket lines, including the primary picket line of Unions party to this Agreement and including primary picket lines at the Employer's place or places of business."

NAPA employs approximately one hundred and ten employees at its Hamilton Avenue place of business and of these approximately fifty-four are represented for the purpose of collective bargaining by Local Union No. 926. The present effective contract does not expire until May 31, 1974.

On August 29, 1973 NAPA Altoona, Inc. (hereinafter referred to as Altoona) entered into an agreement with Teamsters, Chauffeurs and Helpers Local 110, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, to conduct a representation election on October 5, 1973 among the warehousemen and truck drivers employed by Altoona at its Duncanville facility. This agreement was approved August 30, 1973 by the Regional Director of Region 6 of the National Labor Relations Board.

On September 5, 1973 at approximately 7:30 A.M. members of Local 110 commenced picketing the plaintiff's premises at 6550 Hamilton Avenue, Pittsburgh, Pennsylvania. With the exception of approximately seven union members who initially reported to work and then left, all union members employed by NAPA in Pittsburgh have refused to cross the picket line in support of Local Union 110's demand for recognition at Altoona. The testimony shows that Local 926 instructed its members that it would not be a violation of its contract if any of the members refused to enter upon the premises at 6550 Hamilton Avenue because this was a primary picket line and the contract specifically provided that it would not be a cause for discharge or disciplinary action for an employee to refuse to enter the premises where there was a primary picket line.

This Court is called upon to once again balance the rigid standards as applied in the Steelworkers Cases (where only the most forceful evidence of a purpose to exclude the claim

from arbitration can prevail—*United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 8 S.Ct. 1347, 4 L.Ed. 2d 1409), and the restrictions of the Boys Markets principle which must guide this Court in granting injunctive relief: (*Boys Markets, Inc. v. Retail Clerks Union Local 770*, 398 U.S. 235, 90 S.Ct. 5183, 26 L.Ed. 2d 199 (1970)).

> "A District Court entertaining an action under § 301 may not grant injunctive relief against concerted activity unless and until it decides that the case is one in which an injunction would be appropriate despite the Norris-LaGuardia Act. When a strike is sought to be enjoined because it is over a grievance which both parties are contractually bound to arbitrate, the District Court may issue no injunctive order until it first holds that the contract *does* have that effect; and the employer shall be ordered to arbitrate, as a condition of his obtaining an injunction against the strike. Beyond this, the District Court must, of course, consider whether issuance of an injunction would be warranted under ordinary principles of equity—whether breaches are occurring and will continue, or have been threatened and will be committed; whether they have caused or will cause irreparable injury to the employer; and whether the employer will suffer more from the denial of an injunction than will the union from its issuance." 398 U.S. at 254, 90 S.Ct. at 1594, 26 L.Ed. 2d at 212.

Pursuant to the holding in *Boys Markets, supra,* we first examined the Agreement. There can be no doubt that any grievances, complaints or disputes arising between the employer and the union, or any employee represented by the union, was subject to the arbitration procedure. It may be noted that the rationale underlying the Agreement was that the parties were desirous of entering into this Agreement as to wage rates and

conditions of employment "to do away with the possibility of strikes, boycotts, lockouts and the like". It is thus perfectly clear that the intent of the parties was to employ arbitration as the mechanism for the settlement of the industrial disputes as set forth in the Agreement without resort to self-help measures. Consistent with this intent, the Court holds that the arbitration procedures established therein are mandatory within the meaning of *Boys Markets.*

Having determined that the arbitration is mandatory, the next question to be considered by the Court is whether the matter in dispute between the parties is treated by the terms and conditions of the Agreement and is, therefore, arbitrable. The alleged dispute in the instant case concerns the honoring of another union's picket line. The Local contends that they are entitled to honor the "110" picket line while the Company contends that the union in observing the picket line is in violation of the "No Cessation of Work Clause" in its Agreement. The Company course alleges that the work stoppage is in violation of the Collective Bargaining Agreement and the Company is willing to settle the question of the scope of the No Cessation Clause through contractural grievance arbitration procedure, and that the Company will suffer irreparable injury if the work stoppage continues. We are not proceeding in unchartered waters here, for we deem this case to be comparable with the case of *Amstar Corporation v. Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, et al.*, 468 F.2d 1372 (1972). In that case, Amstar Corporation had a collective bargaining contract with Amalgamated for its Chalmette refinery. Local unions affiliated with the International Longshoremen's Association represented employees at Amstar's refineries in Brooklyn, Philadelphia, and Boston. In early January 1972 following expiration of its collective bargaining contracts, Amstar employees in the three cities went on strike. ILA stationed pickets around Chalmette, and having been advised of their rights by the union, the Chalmette

employees refused to cross the ILA picket line and remained away from work. In the opinion filed by Circuit Judge Dyer the following appears:

> "The strike by the Chalmette employees was not 'over a grievance' which the parties were contractually bound to arbitrate. Rather, the strike itself precipitated the dispute —the validity under the Union's no-strike obligation of the member-employees honoring the ILA picket line. Were we to hold that the legality of the very strike sought to be enjoined in the present situation constituted a sufficiently arbitrable underlying dispute for a *Boys Market* injunction to issue, it is difficult to conceive of any strike which could not be so enjoined. The *Boys Market* holding was a 'narrow one', not intended to undermine the vitality of the anti-injunction provision of the Norris-LaGuardia Act. Indeed, the Supreme Court specifically stated that is (sic) decision did not mean 'that injunctive relief is appropriate as a matter of course in every case of a strike over an arbitrable grievance'."

This Court is acutely aware of the difference in wording of contracts, such as in Hershey (*Local 464, American Bakery and Confectionery Workers International Union, AFL-CIO v. Hershey Chocolate Corporation*, 266 F.Sup. 276 (M.D.Pa. 1967), 310 F.Sup. 1182 (M.D.Pa. 1970), affirmed Per Curiem 433 F.2d 926 (3d Cir. 1970)) which applied an arbitration procedure "to any matters which an employee may desire to discuss and adjust with the Employer" which could not require arbitration for employees of a subsidiary company; and the language contained in *Philadelphia Lith. & Photo. Int. U., L.7-P v. Parade Pub., Inc.*, 352 F.Sup. 634 (1972), where the language was "All questions of difference concerning an interpretation of this Agreement and all questions arising between the Employer and his Employee, . . . which can not be amicably adjusted in conciliation, shall be submitted to an Arbitration Committee".

We must then again come back to the question whether the underlying dispute in this case, that is the right of the Local Union to refuse to cross the picket line is a grievance, complaint or dispute arising between the Employer and the Union "and covered by this Agreement".

The Contract contained, under Article XIII, a specific provision for picket lines. In light of this specific provision it would seem that the question of the right to cross a picket line was made part of the Agreement over which the arbitration clause became a compulsory method of procedure which this Court must enforce.

It is noted that it is not the Court's role to make an independent examination of the merits of the dispute and we have not done so. We have confined ourselves solely to an analysis of the case at bar through the contractual language of the Collective Bargaining Agreement as set forth by the parties. In concluding that we must grant the injunction to compel arbitration of the question before this Court we believe we are completely following the dictates of our Circuit Court of Appeals in *Parade Publications, Inc. v. Philadelphia Mailers U. No. 14*, 459 F.2d 369 (1972) when that Court specifically set forth that the Court on an evidentiary basis must make findings which include that the strike is over an arbitrable issue.

The final consideration compelled by *Boys Market* involves the principles of equity. Will the employer suffer irreparable injury by continuance of the work stoppage? Will the employer suffer more from a denial of the injunction than will the union from its issuance?

The evidence at the hearing in this matter is uncontroverted that the productivity of the company was brought to a screeching halt during the alleged work stoppage, and that the company would suffer irreparable injury from continuance of the

alleged work stoppage. It is further clear that the company would suffer considerably more from the denial of the injunction than the union would from its issuance. The union may still press any grievance in the matter anticipated by the parties to arbitration. The equities of this case lie heavily in favor of arbitration because it is this Court's opinion that diligent and meaningful negotiation can bring about more lasting and permanent results than by resort to self-help measures such as were attempted in this case.

For the foregoing reasons, the injunction will issue and the parties will be ordered to participate in arbitration over the right of the union to recognize the picket line and thus bring about a work stoppage affecting the operations of NAPA Pittsburgh, Inc. at its place of business at 6550 Hamilton Avenue, Pittsburgh, Pennsylvania.

An appropriate order will be issued.

Order of Court

And Now, this 11th day of September, 1973, upon the complaint, argument and briefs by counsel and after a full hearing in open Court, it appearing that irreparable harm and damage will occur if a Preliminary Injunction is not issued; It Is Ordered, Adjudged and Decreed

1. That a Preliminary Injunction issue against the Defendant Union, Local No. 926, their officers, representatives, agents and members and the individual defendants named in the complaint, and all other persons acting in concert or participating with them without prejudice;

(a) To cease their work stoppage or any other forms of concerted economic activity against the Plaintiff and their refusal

to work or encouraging others to refuse to work in any other way in violation of the Collective Bargaining Agreement between the Defendant Union and the Plaintiff.

(b) To require their members who are employed by the Plaintiff to return to work immediately and cease their work stoppage in honoring the picket line of Local 110.

(c) To arbitrate this dispute and other disputes which may arise under the aforesaid Collective Bargaining Agreement rather than resort to a work stoppage.

2. That the Court retains jurisdiction of this complaint to determine that the Decree of the Court is obeyed.

3. That this Preliminary Injunction continue in full force and effect until further Order of this Court.

4. That a true and correct copy of this Order may be served upon the Defendants by a competent adult in accordance with the Federal Rules of Civil Procedure.

5. That Bond in the sum of $5,000.00 be filed.

/s/ DANIEL J. SNYDER, JR.
United States District Judge

APPENDIX C

United States Court of Appeals
for the Third Circuit

No. 73-1798

NAPA Pittsburgh, Inc.

vs.

Automotive Chauffeurs, Parts & Garage Employees, Local Union No. 926, et al., Appellants.

(D. C. Civil Action No. 73-764)

On Appeal From the United States District Court
For the Western District of Pennsylvania

Present: Seitz, *Chief Judge* and Van Dusen, Aldisert, Adams, Gibbons, Rosenn, Hunter, Weis and Garth, *Circuit Judges*

JUDGMENT ON REHEARING

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel and later submitted on rehearing en banc.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court filed September 11, 1973, be, and the same is hereby affirmed. Costs taxed against appellants.

Attest:

/s/ THOMAS P. QUINN
Clerk

August 8, 1974

APPENDIX D

STATUTES INVOLVED

1. Section 4 of the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. § 104 provides:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
>
> (e) Giving publicity to the existence of, or the facts involved in any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
>
> (h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and
>
> (i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in Section 3 of this Act.

2. Section 301(a) of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. § 185(a) provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States have jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-419

AUTOMOTIVE CHAUFFEURS, PARTS AND GARAGE EMPLOYEES, LOCAL UNION 926, ET AL.,
Petitioners,
v.
NAPA PITTSBURGH, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

Respondent accepts Petitioners' reference to the reports of the case below, jurisdictional statement, and citation of statutes involved.

QUESTION PRESENTED

Where a collective bargaining agreement provides for a mandatory grievance procedure culminating in binding arbitration during which there shall be no cessation of work and further provides that it is not a violation of the agreement to honor "primary picket lines", does a district court have authority, pursuant to Section 301 of the Labor-Management Relations Act of 1947 (LMRA), to issue an injunction and order arbitration of a bona fide dispute between an employer and a labor organization over the status of a picket line established at the employer's facility by a stranger labor organization?

STATEMENT OF CASE

NAPA Pittsburgh, Inc. ("NAPA") is a Pennsylvania corporation with its executive offices and principal place of business at 6550 Hamilton Avenue, Pittsburgh, Pennsylvania. The Automotive Chauffeurs, Parts and Garage Employees, Local 926, an affiiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Local 926") and NAPA entered into a three year collective bargaining agreement effective June 1, 1971, whereby "any and all grievances, complaints or disputes arising between the Employer and the Union or any employee represented by the Union and covered by the Agreement" are ultimately determined by binding arbitration without a cessation of work. The collective bargaining agreement further provides in Article XIII that:

> "It shall not be a violation of this Agreement and it shall not be cause for discharge or disciplinary action in the event an employee refuses to enter upon any property involved in a *primary labor dispute* or refuses to go through or work behind any picket lines, including the *primary picket lines* of Unions party to this Agreement and including *primary picket lines* at the Employer's place or places of business." [emphasis supplied]

On August 29, 1973, NAPA Altoona, Inc. ("Altoona"), a separate corporation with its place of business located approximately 120 miles from Pittsburgh, Pennsylvania entered into an agreement with Teamsters, Chauffeurs and Helpers Local 110, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Local 110") to conduct a representation election of October 5, 1973, among the warehousemen and truck drivers employed

by Altoona at its Duncansville, Pennsylvania, facility. This agreement was approved on August 30, 1973, by the Regional Director of Region 6 of the National Labor Relations Board. On the same day this agreement was executed, Local 110 notified Local 926, through its Secretary-Treasurer, of the intent to strike Altoona and to send pickets to the Hamilton Avenue place of business of NAPA. On September 5, 1973, at approximately 7:30 a.m., members and adherents of Local 110 commenced picketing NAPA at 6550 Hamilton Avenue, Pittsburgh, Pennsylvania. From that date, members of Local 926 refused to cross the picket line and to go to work at the Hamilton Avenue facility with the approval of Local 926 despite the request of NAPA for Local 926 to cease honoring the secondary picket line established by Local 110. Local 926 advised its members that it was not a breach of the collective bargaining agreement to refuse to cross the Local 110 picket line as the picket line was primary in nature.

Because of the dispute with Local 926 over the status of the picket line established by Local 110 and the ensuing concerted work stoppage by Local 926 and its members because of the said dispute, NAPA instituted the instant case pursuant to Section 301 of the Labor Management Relations Act, 1947[1] to enjoin the said work stoppage in violation of the collective bargaining agreement and to require arbitration of the dispute pursuant to the applicable provisions of the collective bargaining agreement.

The United States District Court for the Western District of Pennsylvania issued an injunction and or-

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1. 61 Stat. 157, 29 U.S.C. §185 (a).

dered arbitration upon finding that the grievance procedure in the collective bargaining agreement was mandatory, the dispute between NAPA and Local 926 was covered by the collective bargaining agreement and arbitrable, and NAPA was suffering irreparable harm. In a six to three decision, the United States Court of Appeals for the Third Circuit affirmed the judgment of the district court with all judges agreeing that the dispute between NAPA and Local 926 was arbitrable.

REASONS WHY WRIT SHOULD NOT BE GRANTED

I. The Decision Below Does Not Conflict With The Holding Of This Court In The Boys Markets v. Retail Clerks Union, Local 770, 398 U.S. 235.

The United States Court of Appeals for the Third Circuit in affirming the Order enjoining the work stoppage and mandating arbitration of the dispute correctly applied the principles of the decision of this Court as enunciated in *Boys Markets, Inc. v. Retail Clerks, Local 770,* 398 U.S. 235 (1970). *Boys Markets* holds in essence that when the parties to a collective bargaining agreement have provided a peaceful, voluntary, and binding method of settling disputes arising during the life of the agreement this method must be utilized and the union may not attempt to defeat the jurisdiction of an arbitrator by the application of economic force in the form of a strike.[2] The statement of the issue by Mr. Jus-

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2. "On the other hand, the central purpose of the Norris-LaGuardia Act to foster the growth and viability of labor organizations is hardly retarded—if anything, this goal is advanced—by a remedial device that merely enforces the obligation that the union freely undertook under a specifically enforceable agreement to submit disputes to arbitration. We conclude, therefore, that the

tice Brennan in *Boys Markets* clearly controls the present dispute:

> "In this case we re-examine the holding of *Sinclair Refining Co. v. Atkinson,* 370 U.S. 195 (1962), that the anti-junction provisions of the Norris-LaGuardia Act preclude a federal district court from enjoining a strike in breach of a no-strike obligation under a collective-bargaining agreement, even though that agreement contains provisions, enforceable under §301 (a) of the Labor Management Relations Act, 1947, for binding arbitration of the grievance dispute *concerning which the strike was called."* 398 U.S. at 237-238 [emphasis supplied]

The strike at NAPA concerned the status of the picket line: Was it primary or was it secondary? It is not argued by Local 926 that there would have been no strike had it agreed with the characterization by NAPA of Local 110's picket line as secondary. The dispute between the parties was the status of the picket line, and Local 926 decided to enforce its interpretation by the use of economic force in place of arbitration.

Boys Markets and the decision of this Court in *Gateway Coal Company v. United Mine Workers*[3] are based on an exception to Section 4 of the Norris-LaGuardia Act[4] requiring the utilization of the arbitration procedure when the contract is susceptible of requiring bind-

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unavailability of equitable relief in the arbitration context presents a serious impediment to the congressional policy favoring the voluntary establishment of a mechanism for the peaceful resolution of labor disputes . . ." 398 U.S. at 252-253.

3. 414 U.S. 368 (1974).

4. 47 Stat. 70, 29 U.S.C. §104.

ing arbitration.[5] Local 926 and NAPA provided a method of settling their disputes by such arbitration and specifically provided that Local 926 could strike only in the presence of primary picket lines. If Local 926 had not desired arbitration over bona fide disputes arising over the status of picket lines, then it could have assured such a result by the very simple expedient of having the contract provide that disputes over the status of picket lines are not subject to the arbitration procedure.

To permit Local 926 to enforce its characterization of the picket line by economic pressure while arbitration is proceeding, would leave NAPA no course of action to protect itself other than a subsequent action for damages which would merely exasperate the collective bargaining relationship.[6]

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5. "Although the Court of Appeals did not state that § (e) was an express exception to the arbitration clause, it evidently believed that the section created an ambiguity in the agreement which had to be resolved against arbitrability. However, as the Court stated in United Steelworkers v. Warrior & Gulf Navigation Co., *supra*, '[d]oubts should be resolved in favor of coverage.' 363 U.S., 582, 80 S. Ct., at 1353. Thus, '[i]n the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad.' *Id.*, at 585, 80 S.Ct., at 1354. Since § (e) clearly does not constitute an express exception to the arbitration clause, it follows that the safety dispute in the instant case must be deemed to fall within the broad arbitration clause." 414 U.S. at 380 n. 10.

6. "While it is of course true, as respondent contends, that other avenues of redress, such as an action for damages, would remain open to an aggrieved employer, an award of damages after a dispute has been

II. The Decision Below Is Not In Conflict With Any Decision Of Another Court Of Appeals.

Local 926 in seeking a Writ of Certiorari to the United States Court of Appeals for the Third Circuit alleges that the decision in this case is in direct conflict with the decision of the United States Court of Appeals for the Fifth Circuit in *Amstar Corporation v. Amalgamated Meat Cutters,* 468 F. 2d. 1372 (1972). There is no such conflict. *Amstar* holds that arbitration may not be ordered over the issue of whether or not the honoring of picket lines is arbitrable under a broadly drawn no-strike provision when the collective bargaining agreement is silent as to the rights and obligations of the parties with respect to the honoring of picket lines. This is clearly not the fact in the present case. NAPA and Local 926 specifically delineated their rights and obligations concerning the honoring of picket lines in their collective bargaining agreement. Unfortunately, when a dispute arose over the issue of the status of a picket line, Local 926 attempted to circumvent the method the parties had chosen to settle the dispute. The question in *Amstar* was whether or not a United States District Court may enjoin a work stoppage when the work stoppage itself is the cause of the grievance. In the case presently before this Court, the grievance is not the strike itself, but whether or not the conditions precedent to a lawful strike have been met.

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settled is no substitute for an immediate halt to an illegal strike. Furthermore, an action for damages prosecuted during or after a labor dispute would only tend to aggravate industrial strife and delay an early resolution of the difficulties between employer and union." 398 U. S. at 248.

Reasons Why Writ Should Not Be Granted.

There may be a conflict between the decisions of the United States Court of Appeals for the Fifth Circuit in *Amstar* and the decision of the United States Court of Appeals for the Fourth Circuit in *Monongahela Power Company v. Local 2332, IBEW,* 484 F.2d 1409 (1973), as stated by Local 926, but the conflict between the Circuits in those decisions is not involved in this case. On the contrary, the decision of the Court of Appeals for the Third Circuit in the instant case is in accord with the decisions of the Court of Appeals for the Fourth Circuit in the case of *Pilot Freight Carriers, Inc. v. Local 391, Teamsters*[7] and in the case of *Local 1426, Longshoremen v. Wilmington Shipping Co.,*[8] holding that disputes over the satisfaction of conditions precedent to the right to conduct a concerted work stoppage are proper subjects for a District Court to issue an injunction and order arbitration pursuant to Section 301 of the LMRA.

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7. 497 F.2d 311 (4th Cir. 1974), *cert. denied,* ..... U.S. ....., 43 U.S.L.W. 3199 (U.S. Oct. 15, 1974).

8. ..... F.2d ....., 86 LRRM 2846 (4th Cir. 1974), *petition for cert. filed,* 43 U.S.L.W. 3148 (U.S. Sept. 17, 1974) (No. 288).

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be denied.

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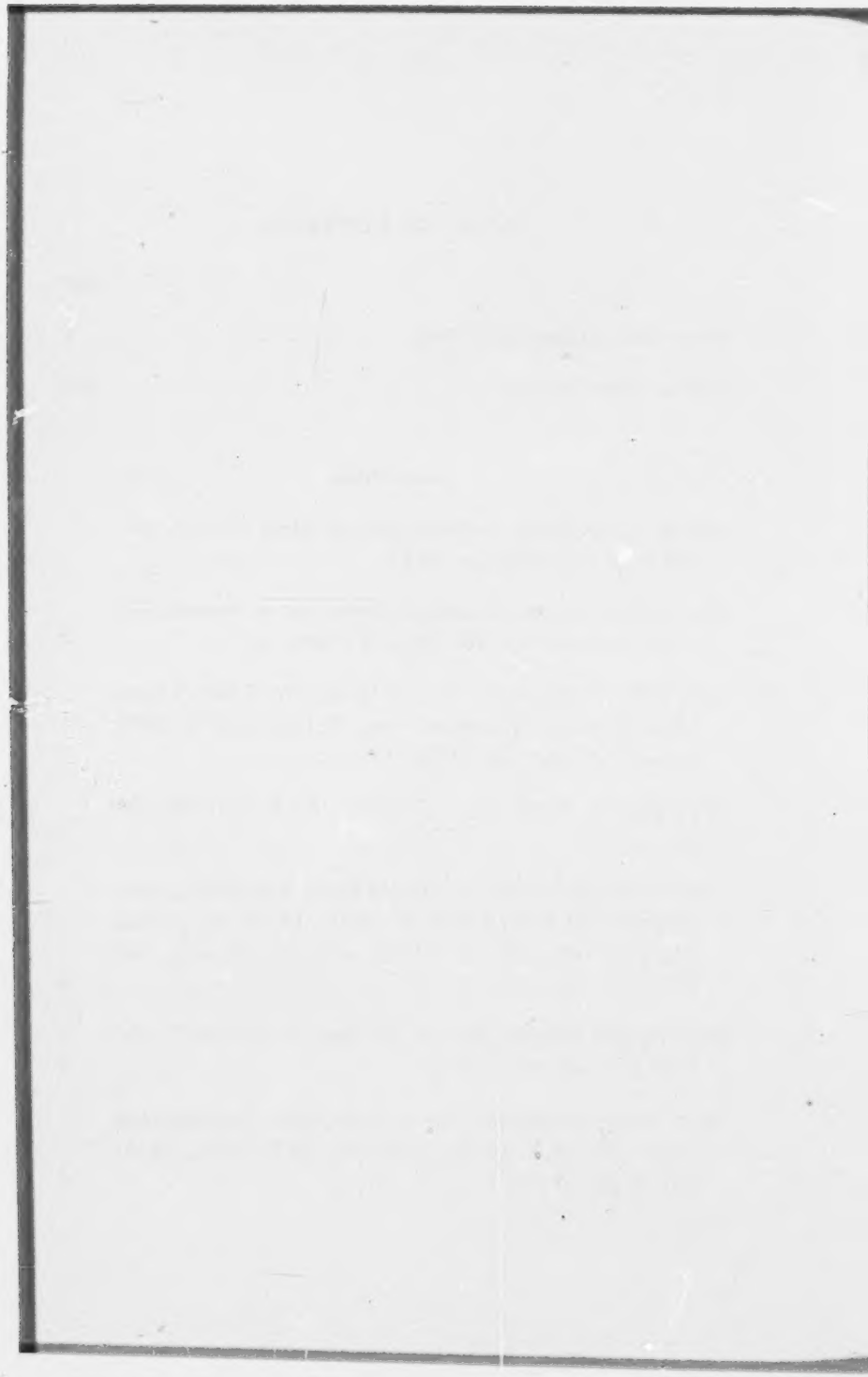

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-419

AUTOMOTIVE CHAUFFEURS, PARTS AND GARAGE EMPLOYEES LOCAL UNION 926, et al.,
Petitioners,

v.

NAPA PITTSBURGH, INC.,
Respondent.

REPLY AND SUPPLEMENTAL BRIEF FOR PETITIONERS

Contrary to the suggestion, implicit in the holding of the court below, the opposition to certiorari, the holdings of the Fourth Circuit,[1] and more recently, of the Seventh Circuit,[2]

[1] *Monongahela Power Co. v. IBEW*, 484 F.2d 1209 (4th Cir., 1973). *Pilot Freight Carriers, Inc. v. Int. Bro. of Teamsters*, 497 F.2d 311 (4th Cir., 1974).

[2] *Inland Steel Company v. Local Union No. 1545, United Mine Workers of America*. Nos. 72-1893 and 72-1894, decided October 22, 1974. The opinion of the court and the dissenting opinion are reproduced in their entirety in the Appendix hereto and referred to as "App."

the issue in this and those cases is not whether the right to respect the picket line is arbitrable, either as to the right to recognize or the question of whether the picket line is primary. Petitioners readily concede, for the purpose of the issues before this Court, that the picket lines at respondent NPI's premises do pose questions arbitrable under this agreement.

The issue before this Court is whether the federal district courts may issue injunctions restraining the right to recognize the picket line pending arbitration where the controversy which caused the picket line is *not* an arbitrable question. In this and the other cases there was no challenge to the strike itself as in violation of the contract nor any claim that the work stoppage by the employees who respected the strikers' picket line was other than supportive of their goals in the underlying strike. Here, for example, NPI's grievance was simply that its employees had breached contractual no-strike obligations by ceasing work when Local 110's picket line was established at their work place, a claim that the Fifth Circuit holds insufficient to support a *Boys Markets* injunction. *Amstar Corporation v. Amalgamated Meat Cutters, etc.*, 468 F.2d 1372 (5th Cir., 1972).[3]

The recent divided decision of the Seventh Circuit in *Inland Steel* again points up the wide import of the question presented

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[3] No sophistic distinction between the status of the picket line *i.e.*, whether it was "primary" or "secondary", amd the work stoppage itself can obscure the fact that, at bottom, NPI merely disputed the contractual validity of the work stoppage (*Opp. Cert.*, p. 5). Respondent claimed no agreement whatever with the picketing union and sought no relief against it. It asserted a promise by petitioner Local 926 that its members would not cease work pending arbitration of NPI's claim that the picket line was secondary. Thus the claim that the holding in *Amstar* is distinguishable, *i.e.*, that the grievance here "is not the strike [Local 926's work stoppage] itself, but whether or not the conditions precedent to a lawful strike have been met" is, substantively as well as literally, a distinction without a difference (*Opp. Cert.*, p. 7).

here and the compelling need for guidance from this Court in resolving it. There, simply because the agreement contained an arbitration clause sufficient to cover the dispute, the majority[4] upheld an injunction against work stoppages by mine workers who had honored picket lines established at the mine by construction firm employees. Although the majority sought to distinguish the *Amstar-Monongahela* conflict because those contracts contained express no strike clauses, Judge Fairchild reasoned in dissent, expressing agreement with Judge Hunter's analysis here and with *Amstar*, that *Boys Markets* requires the arbitrable dispute to be the *cause* of the work stoppage.

> "To enjoin in the prevent case is not to present substitution of a strike weapon for the arbitration procedure agreed upon, but to presume that recognition of a picket line has been forbidden by the contract unless and until an arbitrator rules that it has not."
>
> "To hold otherwise [than with Judge Hunter] would be to permit the narrow exception created by Boys Markets to subsume the rule." (App. p. A-13)

The irreconcilable readings of *Boys Markets* represented by *Amstar* and by the decision below, like the opposing theories of Judge Fairchild and the majority in *Inland Steel*, cannot be limited by a proliferation of inconsequential factual distinctions. The Fifth Circuit in *Amstar*, the dissenters below and now Judge Fairchild construe *Boys Markets* to require that the arbitrable dispute be the cause rather than the consequence of the work stoppage. The Third and Fourth Circuits and now a panel of the Seventh Circuit do not. That frames the issue before this Court. Whether the work stoppage is presumed to be forbidden by a no-strike pledge implied instead of express, or to be prohibited by a no-strike obligation because it exceeds contract language reserving a limited

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[4] Senior Circuit Judge Knoch and Senior District Judge Campbell.

right to respect picket lines, has nothing whatever to do with that issue.

Clearly, if this vital question was not resolved in *Boys Markets*, it ought now to be answered. The decision below would diminish the effectiveness of the striking union's self-help efforts and severely reduce the bargaining power of those unions who need it most—the ones made up of unskilled and semi-skilled workers.[5] That the decision below only "suspends" the right to respect picket lines scarcely minimizes the importance of the injunction. In economic combat, as this Court has recognized, such delay may create such an imbalance in economic power as to make the right to self help illusory.[6] In addition, what one court recently termed the "uncertain state of the law" and the "two divergent lines of authority" on this question[7] present compelling considerations warranting review.

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[5] *Northwest Airlines, Inc. v. AirLine Pilots Association International*, 325 F.Supp. 994, 1004 (D. Minn., 1970), *inj. granted* 442 F.2d 246 (8th Cir., 1970); *aff'd on rehearing*, 442 F.2d 251 (8th Cir., 1971).

[6] *Bro. of Railway and Steamship Clerks, etc. v. Florida East Coast Railway Co.*, 384 US 238, 246 (1966).

[7] *Plain Dealer Publishing Co. v. Cleveland Typographical Union No. 53*, Case No. C74-1001 (N.D. Ohio, 1974); slip op. pp. 14-15. Judge Green's opinion, issued on November 8, 1974, concluded that *Amstar* was the "sounder view" and therefore denied injunctive relief against other unions holding contracts with the newspaper whose members respected picket lines established by striking members of Cleveland Newspaper Guild Local No. 1.

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ADDENDUM

INLAND STEEL CO. v. UMW

U. S. Court of Appeals,

Seventh Circuit (Chicago)

INLAND STEEL COMPANY v. LOCAL UNION NO. 1545, UNITED MINE WORKERS OF AMERICA, et al.; FREEMAN COAL MINING CORPORATION v. UNITED MINE WORKERS OF AMERICA, et al., Nos. 72-1893 and 72-1894, October 22, 1974.

CAMPBELL, Senior District Judge:—These cases, Numbers 72-1893 and 72-1894, although separately briefed and argued, are consolidated for opinion since they involve similar facts and identical questions of law. The issue presented is whether the defendant unions' conduct in honoring a stranger union's picket line constituted an arbitrable issue under the collective bargaining agreement in force between the parties, and if so, whether that duty to arbitrate gave rise to an implied no-strike clause justifying the issuance of a Boys Markets[1] injunction. A related subsidiary question concerns the propriety of the injunctive order under traditional equitable considerations. Before reaching these issues, a threshold inquiry must be made into the union's right to challenge the underlying injunctive orders inasmuch as civil contempt citations were entered upon findings of the district court that the unions had willfully violated the injunction orders.

I. The basic facts in both cases are largely undisputed and present a common factual scheme. Local 1545, United Mine Workers of America ("Local 1545"), represents underground employees of the plaintiff, Inland Steel Company ("Inland"), at

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[1] Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235 (1970).

its coal mine in Sesser, Illinois. Local 9111, United Mine Workers of America ("Local 9111"), represents underground employees of the Freeman Coal Mining Corporation ("Freeman") at its Orient No. 3 Mine in Waltonville, Illinois. At all pertinent times, both parties were bound by the National Bituminous Coal Wage Agreement of 1971.

During this same period, Local 9111 also represented certain construction workers employed by Roberts & Shaefer Company who had been engaged in construction work at Freeman's Orient No. 3 Mine since February or March of 1972. The relationship between the construction workers and their employer was governed by a separate collective bargaining agreement known as the National Coal Mine Construction Agreement.

In addition to Freeman's Orient No. 3 employees who were represented by Local 9111, other mining employees of Freeman at its various mines were represented by Locals 1591, 9878, and 1284 of the United Mine Workers of America. These employees were also covered by the National Bituminous Coal Wage Agreement of 1971.

On August 14 and 15, 1972, construction employees of Roberts & Shaefer Company and members of Local 9111 appeared at Orient No. 3 and other Freeman mines and began picketing. Such pickets were also established at Inland's coal mine in Sesser, Illinois on August 15, 1972. The purpose of the picketing was stated to be the Pay Board's failure to approve the full measure of certain wage increases previously negotiated on behalf of the construction workers. As a result of the pickets, mining employees who were members of Locals 1545, 1591, 9111, 9878 and 1284 failed to report for work at Inland's mine and the various Freeman mines.

The work stoppages continued for two days, after which both Inland and Freeman, in separate actions, petitioned the district court for injunctive relief under Section 301 of the Labor Man-

agement Relations Act (29 U.S.C. § 185) and the rationale of Boys Markets.[2] The companies argue that the broad arbitration clause contained in the collective bargaining agreement governed this dispute and required that it be submitted to arbitration. The unions, on the other hand, maintain that Section 4 of the Norris-LaGuardia Act (29 U.S.C. § 104) deprived the district court of jurisdiction over this controversy.[3]

Almost simultaneously with the filing of the verified complaints, the district court entered ex parte temporary restraining orders calling for a halt to the work stoppages. Several days later, following full hearings at which all parties were represented by counsel, the district court entered temporary injunctions in both cases, specifically relying upon the holding in Boys Markets. The stoppages continued, however, and hearings on contempt citations were held in both cases. In the Freeman case, 72-1894, an order of civil contempt was entered against Locals 9111, 1591, 1284 and 9878 for their violations of the temporary restraining order and temporary injunction. Local 9111 was fined $10,000.00 per day for each day of violation and for each day that work stoppages continued. The other locals were fined $1,000.00 per day. These fines were subsequently reduced to

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[2] 29 U.S.C. § 185(a) provides: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or . . . the citizenship of the parties."

[3] 29 U.S.C. 104 provides:

> "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment. . . ."

$1,000.00 and $100.00 per day, respectively. All four locals have appealed, challenging the validity of both the injunctive and contempt orders.

In the Inland case, 72-1893, a civil contempt order was entered against Local 1545 for its violations of the temporary restraining order and preliminary injunction. A fine of $10,000.00 per day for each day the violation of the court's injunctive order continued was imposed upon Local 1545. This fine was also later reduced to $1,000.00 per day. Local 1545 appeals from both the injunctive and contempt orders.

II. Initially, both companies contend that we need not reach the question concerning the validity of the underlying injunctive orders because the civil contempt orders are otherwise enforceable. In this regard, they maintain that the district court had jurisdiction over the parties and the authority to determine its own jurisdiction under the Norris-LaGuardia Act, and that the injunctive orders were required to be complied with until reversed or set aside by orderly and proper review proceedings.[4] See, United States v. Mine Workers, 330 U.S. 258, 293 (1947); Bethlehem Mines Corporation v. United Mine Workers of America, et al., 476 F.2d 860 (3rd Cir. 1973).

In the Bethlehem Mines case, the Court of Appeals for the Third Circuit reached just such a result on the facts closely resembling those present in the cases before us. There is, however, one critically distinguishing factor in Bethlehem Mines. Insofar as it can be gleaned from that court's opinion, the contempt order there was coercive in nature; that is, it was designed to promote obedience to the court's orders. Where that is the case, the coercive civil contempt order is analogous to the criminal contempt order which clearly must be obeyed in order

[4] See, Cox, "The Void Order and the Duty to Obey", 16 U. of Chi. L. Rev. 87-115 (1948), for an analytical discussion of these "jurisdictional" concepts.

to permit the alleged contemnor to challenge the propriety of the underlying injunctive order. See Brotherhood of Loc. Fire and Eng. v. Bangor and Aroostock R. Co., 380 F.2d 570, 583 (D.C. Cir. 1967); United States v. Mine Workers, 330 U.S. 258 (1947).

The contempt orders here, however, stand on a different footing. They were specifically found by the district court to be "in the nature of conpensation for losses and damages suffered by" the companies. Where the contempt is compensatory, "[t]he right to remedial relief falls with an injunction which events prove was erroneously issued, . . . and *a fortiori* when the injunction or restraining order was beyond the jurisdiction of the court." United States v. Mine Workers, 330 U.S. 258, 295 (1947). Thus, if the contempt orders are to be sustained here, the validity of the underlying injunctions must be established.

III. We proceed then to the merits of this controversy. The first question is whether the parties had a duty to arbitrate this dispute under the terms of the collective bargaining agreement then in effect between them. Although concededly difficult to articulate, the dispute may be characterized as whether the unions had the right under the agreement to refuse to cross picket lines established by another union.

The pertinent parts of the collective bargaining agreement were recently described by the Supreme Court in the case of Gateway Coal Co. v. Mine Workers, 414 U.S. 368, 38 L.Ed.2d 583, 590-592 (1974) which involved the National Bituminous Coal Wage Agreement of 1968. While discussing the arbitration provisions of the 1968 agreement, which are identical to those provisions in the 1971 agreement, the Court stated:

"The section of the agreement entitled 'Settlement of Local and District Disputes' provides for resolution of grievances by direct negotiation between the parties and ultimately, should

such negotiations fail, for arbitration by an impartial umpire 'mutually agreed upon by the operator or operators affected and . . . the United Mine Workers of America.' The section further states that the 'decision of the umpire shall be final.' This arbitration clause governs disputes 'as to the meaning and application of the provisions of this agreement,' disputes 'about matters not specifically mentioned in this agreement,' and 'any local trouble of any kind aris[ing] at the mine.' Paragraph 3 of the 'Miscellaneous' section of the agreement states that both parties 'agree and affirm . . . that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the 'Settlement of Local and District Disputes' section . . .'

> It accepts from the arbitration obligation only those disputes 'national in character'." Gateway Coal Co. v. Mine Workers, 414 U.S. 368, 374-376, 38 L. Ed. 2nd 583, 590-591 (1974).

The "Settlement of Local and District Disputes"[5] and the "Mis-

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[5] This Section provides in relevant part:

"Should differences arise between the Mine Workers and the operators as to the meaning and application of the provisions of this agreement, or should differences arise about matters not specifically mentioned in this agreement, or should any local trouble of any kind arise at the mine, an earnest effort shall be made to settle such differences immediately: (The parties will not be represented by legal counsel at any of the steps below.)

"1. Between the aggrieved party and the mine management.

"2. Through the management of the mine and the mine committee.

"3. Through district representatives of the United Mine Workers of America and a commissioner representative (where employed) of the coal company.

"4. By a board consisting of four members, two of whom shall be designated by the Mine Workers and two by the operators. Neither the Mine Workers' representatives on the board nor the operators' representatives on the board shall be the

cellaneous"[6] sections of the agreement are pivotal as to what constitutes an arbitrable issue thereunder. It is our conclusion that the "any local trouble of any kind aris[ing] at the mine" language contained in this exceptionally broad arbitration clause is itself expansive enough to encompass the present disputes. A work stoppage which results from the honoring of stranger picket lines by company employees, is certainly local trouble at the mine. Any other construction of this language would simply be ignoring the realities of the situation. Moreover, these parties agreed to arbitrate not only disputes concerning the meaning and application of the express provisions of the agreement but also disputes "about matters not specifically mentioned in this agreement." By the use of this terminology, we conclude that the parties mutually contracted to resolve any

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same persons who participated in steps (1), (2), or (3) of this procedure.

"5. Should the board fail to agree the matter shall, within twenty (20) days after decision by the board, be referred to an umpire to be mutually agreed upon by the operator or operators affected and by the duly designated representatives of the United Mine Workers of America, and the umpire so agreed upon shall expeditiously and without delay decide said case. The decision of the umpire shall be final. Expenses and salary incident to the services of an umpire shall be paid equally by the operator or operators affected and by the Mine Workers.

"A decision reached at any stage of the proceedings above outlined shall be binding on both parties hereto and shall not be subject to reopening by any other party or branch of either association except by mutual agreement."

[6] This section provides:

"The United Mine Workers of America and the operators agree and affirm that they will maintain the integrity of this contract and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the 'Settlement of Local and District Disputes' section of this agreement unless national in character in which event the parties shall settle such disputes by free collective bargaining as heretofore practiced in the industry, it being the purpose of this provision to provide for the settlement of all such disputes and claims through the machinery in this contract provided and by collective bargaining without recourse to the courts."

labor difficulties arising during the life of the agreement by the arbitration process other than disputes which are "national in character."

We further believe that this conclusion is enhanced by the strong public policy in favor of arbitration which was persuasively enunciated in the Steelworkers Trilogy.[7] The often discussed presumption of arbitrability for labor disputes was recently reaffirmed by the Supreme Court in Gateway Coal Co. v. Mine Workers, 414 U.S. 368, 38 L.Ed.2d 583, 592-593 (1974). While the arbitrability of the disputes involved here may not be free from doubt the Triolgy has instructed that all such doubts be resolved in favor of arbitration.

In Gateway Coal, the Court also commented upon the value of arbitration, noting that it "provides a method for resolving the unforeseen disagreements that inevitably arise." Collective bargaining agreements cannot anticipate every conceivable labor difficulty, given the intricate relationship between the parties. The merits of an arbitration mechanism in this context were clearly envisioned by Congress when it enacted Section 203 (d) of the Labor Management Relations Act (29 U.S.C. § 173(d)).[8] The resolution of these disputes by a skilled labor arbitrator with his unique knowledge of the common law of the shop lends credence to this policy. The labor arbitration mechanism is better suited than the judicial process for making the kinds of

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[7] United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

[8] This section provides:

> "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."

interest accommodations that are necessary to the peaceful resolution of these disputes.

Mindful of these policy considerations as announced in the Steelworkers Trilogy and recently underscored in Gateway Coal, we, therefore, hold that the dispute here fell within the arbitration clause of the collective bargaining agreement in existence between these parties.

IV. We next consider whether the district court had jurisdiction to enjoin these work stoppages. As indicated in Gateway Coal, this question depends upon whether the union was under a contractual duty not to strike. Absent such a duty, the prohibitions of the Norris-LaGuardia Act deprive the district court of the authority to enter injunctive orders in these cases. However, as the Court held in Boys Markets Inc. v. Retail Clerks Union, 398 U.S. 235 (1970). Section 301 (a) of the Labor Management Relations Act empowers a federal court to prevent violations of a contractual duty not to strike under certain limited circumstances. The principal circumstance is that the work stoppage or strike must have been generated over an arbitrable dispute.

We have previously found that circumstances to be present in these cases. Relying upon Amstar Corp. v. Amalgamated Meat Cutters & B. Workmen, 468 F.2d 1372 (5th Cir. 1972), the unions maintain that the dispute here was not "over a grievance" which the parties were bound to arbitrate, but rather that the work stoppage itself precipitated the dispute. The companies, relying upon Monongahela Power Co. v. Local No. 2332 I.B.E.W., 484 F.2d 1209 (4th Cir. 1973), contend that the violation of a no strike clause, express or implied, constitutes an arbitrable grievance justifying the issuance of a Boys Markets injunction. We conclude that neither Amstar nor Monongahela Power provide any guidance as to the issues before us. Both cases involved express no strike clauses and both courts treated

the issue as whether the violation of an express no strike clause itself creates an arbitrable issue for purposes of a Boys Markets injunction. Here, we have no express no-strike clause and have previously concluded that the work stoppage fell within the general language of the arbitration clause, since the issue of whether the unions may refuse to cross a stranger picket line under this agreement, arbitrable. We express no opinion on the issues as they were presented in Amstar and Monongahela Power.

Nor is it of any consequence that the collective bargaining agreement here does not contain an express nostrike clause, as was present in Boys Markets. In Gateway Coal, this was not considered sufficient to defeat the district court's jurisdiction to enter an injunction under the *rationale* of Boys Markets. The reason is that "a contractual commitment to submit disagreements to final and binding arbitration give rise to an implied obligation not to strike over such disputes." Gateway Coal Co. v. Mine Workers, 414 U.S. 368, 38 L.Ed.2d 583, 594 (1974); Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962); see also, Old Ben Coal Corp. v. Local U. No. 1487 of United Mine Workers, 457 F.2d 162, 164 (7th Cir. 1972). Thus, to the extent that a dispute is arbitrable, there exists an obligation not to strike over that dispute. Since we have concluded that the dispute here is subject to the arbitration process contained in the collective bargaining agreement between the parties, the unions here were bound not to strike. The district court thus had jurisdiction to enter the Boys Markets injunctions in these cases.

V. There remains the question of whether the injunctive orders were proper under traditional equitable considerations. Our examination of the record convinces us that the companies made sufficient showings to entitle them to injunctive relief, including a clear demonstration of irreparable harm resulting from the work stoppages.

Finally, the unions complain that the injunctions were improperly entered because they were not conditioned on the companies' willingness to arbitrate these disputes. The collective bargaining agreement here contains a mandatory arbitration clause. Where a dispute exists which is not otherwise resolved under the 'Settlement of Local and District Disputes' section of the agreement, the parties are contractually obliged to submit the matter to arbitration. At no time have the employers in the instant cases shown a reluctance or unwillingness to arbitrate the issues in dispute. On the contrary, by seeking Boys Markets injunctions, they demonstrated their desire to settle the dispute through arbitration. And, since the injunction may issue only if the dispute is subject to the agreement's mandatory arbitration provisions, the injunctive orders implicitly require the parties to arbitrate. Accordingly, the injunctions were not improperly entered and need not be modified. We view the orders, in their present form, as conditioned upon the parties' willingness to arbitrate the dispute, as they are obliged to do under this collective bargaining agreement.

For the reasons stated, the judgments of the district court in 72-1893 and 72-1894 are affirmed.[9]

AFFIRMED AS MODIFED.

Dissenting Opinion

FAIRCHILD, Circuit Judge, dissenting:—I agree with the majority that the validity of the underlying injunctions is properly before this court. I respectfully disagree with the conclusion that they do not conflict with the Norris-LaGuardia Act.

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[9] Since the underlying injunctive orders have been upheld, and since we find the contempt orders were otherwise proper, they are also affirmed.

The Supreme Court, in Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235 (1970), "accommodated" the Norris-LaGuardia Act's proscription of labor dispute injunctions to the federal substantive policy favoring the private resolution of disputes through grievance and arbitration procedures developed under Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) and its progeny. This accommodation was narrowly circumscribed and limited to the granting of injunctions in situations where a work stoppage was "over a grievance which both parties are contractually bound to arbitrate." 398 U.S. 235, 254 (1970). In my view, the refusal to cross a picket line involved in the present case is not "over" an arbitrable grievance. Here, the dispute that precipitated the stoppage by appellants was the disagreement between the company and the construction workers which led to the formation of the picket line by the construction workers. This dispute is not arbitrable as between the parties to this proceeding, since the appellant unions are not directly involved.

The majority states the arbitrable issue raised by appellants' honoring the stranger picket lines to be "whether the unions had the right under the agreement to refuse to cross picket lines established by another union." (Slip Opinion at p. 6). Concededly, such issue is raised by appellants' actions in this case, and arguably, would be arbitrable.[1] The mere existence of such an issue, does not seem to me sufficient to trigger the limited "accommodation" which Boys Markets made to the strict proscription of injunctive relief of Norris-LaGuardia.

The purpose of Boys Markets was to foster the effectiveness of an arbitration agreement by precluding resort to the strike weapon in place of arbitration to which the parties had agreed.

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[1] The "Settlement of Local and District Disputes" section of the collective bargaining agreement provides for arbitration of "differences . . . as to the meaning and application of the provisions of this agreement. . . ."

To enjoin in the present case is not to prevent substitution of a strike weapon for the arbitration procedure agreed upon, but to presume that recognition of a picket line has been forbidden by the contract unless and until an arbitrator rules that it has not. The matter has been analyzed as follows: "If the arbitrable dispute is not a 'cause' of the work stoppage, then a concession on that dispute by the employer will not help to end the work stoppage. Under these circumstances, the work stoppage will exert no pressure on the employer to resolve the arbitrable issue short of arbitration. Thus, if this basic cause-effect relationship between arbitrable issue and the strike is not present the strike will not discourage arbitration and the policy that favors the arbitration of labor disputes will not be furthered by the issuance of an injunction." N.A.P.A. Pittsburgh, Inc. v. Chauffeurs, Local 926 (3rd Cir. 1974). Hunter, J., *dissenting*. To hold otherwise would be to permit the narrow exception created by Boys Markets to subsume the rule.[2]

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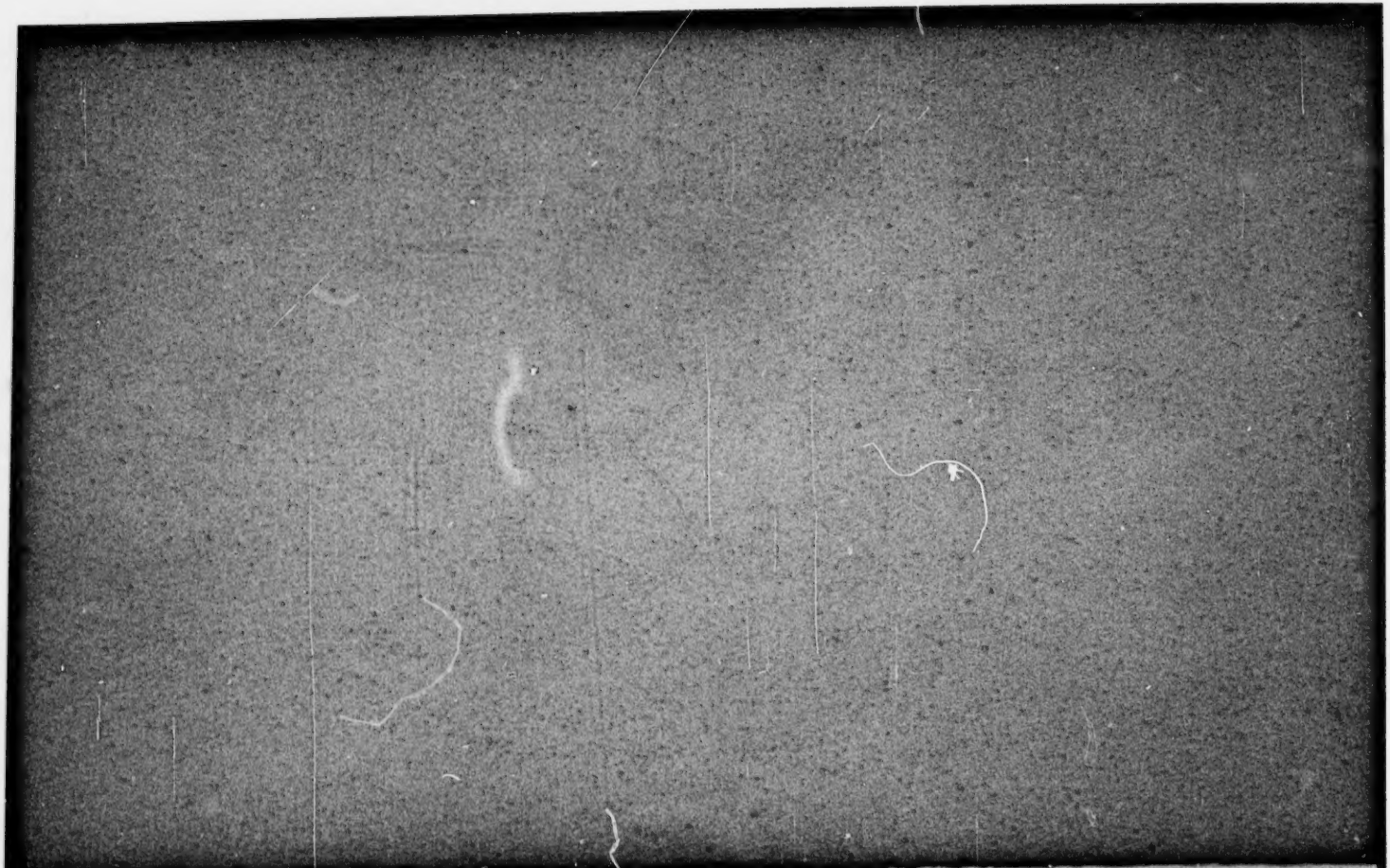
[2] See Amstar Corp. v. Amalgamated Meat Cutters & B. Workmen, 468 F.2d 1372, 1373 (5th Cir. 1972); General Cable Corp. v. IBEW, Local 1644, 331 F.Supp. 478, 482 (D. Md. 1971); Simplex Wire and Cable Co. v. Local 2208, IBEW, 314 F.Supp. 885, 886 (D. N.H. 1970); N.A.P.A. Pittsburgh, Inc. v. Automotive Chauffers, Parts and Garage Employees, Local Union 926 (3rd Cir. 1974), Hunter, J., dissenting; Gary-Hobart Water Corp., 210 NLRB No. 87, 86 LRRM 1210, 1214 (N.L.R.B., 1974). But cf. Monongahela Power Co. v. Local No. 2332, I.B.E.W., 484 F.2d 1209 (4th Cir. 1973); Pilot Freight Carriers v. Teamsters (4th Cir. 1974); Bethlehem Mines Corp. v. U.M.W.A., 86 LRRM 2398 (W.D. Pa. 1974).



SUPREME COURT, U. S.

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IN THE

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OCTOBER TERM, 1974

No. 74-419

AUTOMOTIVE CHAUFFEURS, PARTS AND GARAGE EMPLOYEES LOCAL UNION 926, et al.,
Petitioners,

v.

NAPA PITTSBURGH, INC.,
Respondent.

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioners respectfully petition for rehearing of the order denying writ of certiorari entered on December 9, 1974. As grounds therefor, petitioners urge the intervening circumstances presented in their reply and supplemental brief filed belatedly with the Court on December 9, 1974 together with the following.[1]

[1] We respectfully call particular attention to the dissenting opinion of Judge Fairchild in *Inland Steel Company v. Local Union No. 1545, United Mine Workers, etc.*, issued after this petition was filed and reproduced in the Appendix to the reply and supplemental brief at pp. A-11-A-13.

On three separate occasions in the last three months this Honorable Court has refused to grant a petition for writ of certiorari in cases, including the instant one, in which the Courts of Appeal have affirmed the entry of injunctions against activities which are not subject to restraint under the Norris LaGuardia Act.[2] In each such case, including the instant one, the requirements of the Norris LaGuardia Act were not satisfied as a condition precedent to the entry of the injunction. In each such case, including the instant one, the underlying dispute between the parties which gave rise to the exercise of the protected activities did not arise under a collective bargaining agreement between the parties. In each such case, including the instant one, the lower court issued its injunction against peaceful activities which arose *after* the union struck over the underlying, non-arbitrable dispute. In each such case, including the instant one, the court below read this Honorable Court's admonition in *Boys Markets*[3] that it was creating only a "narrow exception" to the Norris LaGuardia Act, to read "a complete abrogation of the Norris LaGuardia Act", if there was *any* arbitration clause in *any* collective bargaining agreement between the parties even though such arbitration clause did not in any way relate to the basic dispute which gave rise to the strike. In each such case including this one, the strike growing out of the basic dispute was not in violation of a contract but was in fact a strike to arrive at a contract.

And, finally, in each such case, the holding of the court below was in direct conflict with the holding of the Court of Appeals for the Fifth Circuit in *Amstar*.[4]

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[2] *Pilot Freight Carriers, Inc. v. Local 391, Int. Bro. of Teamsters,* 497 F.2d 311 (4th Cir., 1974), *cert. denied* No. 74-48, Oct. 15, 1974; *Local 1426, Int. Longshoremen's Assn. v. Wilmington Shipping Co.*, — F.2d —, 86 LRRM 2846 (4th Cir., 1974), *cert. denied* No. 74-288, Nov. 18, 1974.

[3] *The Boys Markets v. Retail Clerks Union, Local 770,* 398 US 235 (1970).

[4] *Amstar Corporation v. Amalgamated Meatcutters, etc.,* 468 F.2d 1372 (5th Cir., 1972).

The issues presented in this case, regarding the scope of the exception to the Norris LaGuardia Act which was judicially created in *Boys Markets*, is of ever increasing importance to both management and labor in this country since the right to recognize a picket line has been drawn directly into question by these cases, in each of which such right has been suspended by court injunction pending an arbitration which has nothing to do with the conflict which gave rise to the establishment of a picket line. In each case, including the instant one, the lawfulness of the strike is acknowledged. Only picket line activities in support of such strike are in dispute. It is respectfully submitted that such picket line activities, whether arbitrable or not, do not bear the remotest resemblance to the alleged breach of contract arising out of the arbitrable dispute which was before the Court in *Boys Markets*.

CONCLUSION

For the foregoing reasons this Petition for Rehearing should be granted.

Respectfully submitted

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Certificate of Counsel

This is to certify that the foregoing Petition for Rehearing presented in good faith and not for delay, and that the Petition is restricted to the grounds specified in paragraph two of Rule 58 of the Rules of this Court.

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David Previant